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VERMONT, SUPREME COURT
REPORTS



FOR

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT.

BY

WILLIAM G. SHAW.

VOL. 32.

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Dec 3, 1861

JUDGES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS.

PRIOR TO DECEMBER, 1859.

HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. LUKE P. POLAND,
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT, } ASSISTANT JUDGES.

SUBSEQUENT TO DECEMBER, 1859.

HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. LUKE P. POLAND,
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.

ERRATA.

Page 81, line 2 from bottom, for *construction* read *constructive*.

" 217, line 5 from top, for *tiously* read *tortiously*.

" 443, line 2 from top, omit *it*.

" 703, line 2 from bottom, for *auditors* read *orators*.

" 88, line 9 from bottom for ~~*Commit*~~ read ~~*Commit*~~.

" 84, line 2 from bottom for 280 read 450.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR,
AT THE
FEBRUARY TERM, 1859.

PRESENT:

HON. MILO L. BENNETT,	} ASSISTANT JUDGES.
HON. LUKE P. POLAND,	
HON. JOHN PIERPOINT,	
HON. JAMES BARRETT,	

SOLOMON DOWNER v. EBENEZER SMITH.

Rescission of Contracts. Fraud.

Where one has the right to rescind a contract and exercises that right, he must generally restore the other party to the same condition he would have been in, if no contract had been made.

But when one rescinds a contract on the ground of fraud, he is only bound to do so with all reasonable dispatch, after he discovers the fraud, and he does not lose his right to rescind, because at that time the contract has been in part executed, and the parties cannot for that reason be fully restored to their former position.

But if, after discovering the fraud, he continues to act under the contract, his right of rescission is thereby waived.

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When notes are given for the purchase of property, which the purchaser has the right to rescind on account of fraud, but neglects to do so, and continues to act under the contract after he discovers the fraud, he will not be permitted to defend an action upon the notes on the ground of the fraud.

ASSUMPSIT upon a promissory note, signed by the defendant and one Safford, dated May 8, 1856, for two thousand dollars, payable to Warren C. French, or bearer, in sixteen months from date, with interest annually. Plea, the general issue, and trial by jury at the December Term, 1858,—**REDFIELD, CH. J.** presiding.

The execution of the note was admitted, but the defendant claimed that it was obtained by the fraudulent representations of the plaintiff, at the time it was given, he being the party in interest.

The testimony of the defendant tended to prove that the note in suit, with other notes, was given by the defendant and one Safford (since deceased) for some mortgage interests which the plaintiff held on certain lands in the towns of Braintree, Granville, and Roxbury, and that at the date of the note, the plaintiff held a mortgage on the Benjamin Spear farm, lying in Braintree and Granville, executed by Albert Hawes to Daniel Tarbell, Jr., and by Tarbell assigned to the plaintiff; also, a mortgage on the Ephraim Thayer farm, lying in Braintree and Granville, given by Tarbell to Thayer, and by Thayer assigned to the plaintiff, to secure the payment of a note of about fifteen hundred dollars, executed by Tarbell; also, a mortgage on the Bliss farm, lying in Granville, and on lands in Roxbury, executed by Tarbell to the plaintiff to secure him for endorsing a draft for Tarbell for about twenty-four hundred dollars, upon Hatch & Taisey, and also for any debts that Tarbell might then be owing him; that as part of the transaction, and in pursuance of the arrangement previously made, the plaintiff executed to the defendant and Safford an assignment of the Hawes mortgage, and three notes of one thousand dollars each, executed by Hawes and secured thereby; an assignment of Tarbell's mortgage on the Bliss farm and the Roxbury lands, for securing the Hatch & Taisey draft, and a discharge of this mortgage for all other purposes; also, an assignment of Tarbell's mortgage to Thayer, and a quit claim deed to

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the defendant and Safford, of all the plaintiff's interest in all the lands in said towns acquired of Tarbell; that on the twelfth of May, 1856, the defendant and Safford, in pursuance of the arrangement before entered into, executed to the plaintiff a note of about six hundred and twenty dollars, and a bond, to indemnify the plaintiff against the Hatch & Taisey draft, and three promissory notes, of two thousand dollars each, one payable in eight months, one in sixteen months,—the note in suit,—and the other in twenty-four months from date; that previous to the execution of such bond and notes, and also, at the time of their execution and the negotiation of the contract for the transfer of the mortgages, the plaintiff was particularly inquired of by the defendant and Safford, whether there were any other incumbrances on any of the premises; that the defendant then informed the plaintiff that they had no time to go to the different town clerks' offices to examine the records, and that the defendant and Safford should rely upon the statements and representations of the plaintiff in regard to the titles, and that the plaintiff, on various occasions, previous to and at the time of the trade, when inquired of, distinctly represented to and assured the defendant and Safford, that he had been careful to make the examination of the records, and that there was no incumbrance upon the premises prior to his own mortgages, excepting one mortgage executed by Tarbell to the South Royalton Bank, and assigned by the Bank to the State Treasurer, for banking purposes.

The defendant's testimony tended also to prove, that this arrangement was not for the benefit of himself and Safford personally; that they were directors of the South Royalton Bank, to which Tarbell was deeply indebted; that the bank had a general mortgage on all the lands of Tarbell in the towns above mentioned, as security for any indebtedness of his to the bank, which was executed subsequently to the plaintiff's mortgages; that while the general mortgage of the plaintiff existed, the bank could not calculate the value of their own general mortgage, that the plaintiff and Tarbell were in a quarrel, and Tarbell retained the possession from the plaintiff, so that nothing was likely to be realized from the avails of the property for paying off the mortgages of the plaintiff; that in view of this they

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entered into the contract for the benefit of the bank, expecting that the proceeds of the lands and mills, and personal property hereafter mentioned, would be applied, and be sufficient, ultimately, to pay off the notes and bond they had given to the plaintiff, and thus leave the general mortgage of Tarbell to the bank free from the plaintiff's mortgages, and thus secure something of Tarbell's indebtedness to the bank; that the plaintiff was interested in the affairs of the bank to a considerable extent, and was aware of the objects of the arrangement, and those objects were talked over by the plaintiff, defendant, and Safford; that one other object of Smith and Safford in entering into this arrangement, was, that after obtaining a discharge of the plaintiff's mortgages, they were to release, specially, to the bank, their interests, thus acquired, to enable the bank to obtain a further issue of bills from the treasurer, on the re-appraisal of said farms and lands, which had already been made, and a new mortgage had been executed by Tarbell on said farms for that purpose; that the amount which would accrue therefrom would be near three thousand seven hundred and fifty dollars, and it was agreed between the bank, defendant, Safford, and Tarbell, that if the business was thus completed, the money received on such re-appraisal was to come directly into the hands of the defendant and Safford, for the purpose of paying their notes and obligations to the plaintiff, and that the bank were to take security of Tarbell therefor; and that all this was well known to the plaintiff at the time of the trade.

As a further inducement for entering into the business, it was represented to the defendant and Safford, that there was a large amount of personal property on the premises, oxen, sleds, horses and harnesses, and a large amount of lumber and wood fitted and prepared for market, and more in the mills ready to be manufactured, and Campbell, the lessee of the premises, was to transfer to them his rights therein, and that Campbell executed in writing a transfer of all his interest in the premises and personal property, which was known to Downer, and witnessed by him at the time of its execution, and thus the defendant and Safford would have from the avails of such personal property additional means to enable them to meet and pay off to the plaintiff the

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debts thus assumed for Tarbell; that when the defendant went to take possession of the premises and personal property, he found that the plaintiff, on the 12th, 13th or 14th of May, 1856, had attached the wood, lumber and hay, on debts against Tarbell, and had left copies of his writs in the town clerks' offices.

The defendant's testimony further tended to prove, that at the time the defendant gave said notes and bond to the plaintiff, Benjamin Spear held a mortgage on the Spear farm, executed by Tarbell to him, amounting to about eighteen hundred dollars, which was then outstanding and unpaid, and that Daniel Bliss also held a mortgage on the Bliss farm, given him by Tarbell, amounting to near two thousand dollars, also then outstanding and unpaid, and that these mortgages were known to the plaintiff at the time of the trade; that the defendant and Safford knew nothing of these mortgages at the time of the contract, but relied wholly upon the plaintiff's representations and assurances that the premises were free and clear of all incumbrances, except the first mortgage to the bank for the redemption of bills, as before stated; and that neither the plaintiff nor Safford would have taken such assignments and transfers, nor have given their notes and obligations to the plaintiff if they had been informed of the Spear and Bliss mortgages; that the defendant and Safford had no object to own the real estate, but had an interest to enable the bank to make their security good, and have the quarrel between Tarbell and the plaintiff stopped, and did not anticipate any profit, except the advantage to the bank, and that this was the object of the whole transaction, which was all explained to the plaintiff at the time; and that the first they knew of these incumbrances, was upon the return of the agent of the Treasurer, who refused to give certificates as to the titles, except upon the Roxbury lands, upon which the bank received about thirteen hundred dollars, and for which they gave the defendant and Safford a certificate of deposit.

The defendant's testimony tended further to prove, that the defendant and Safford received for sales of the personal property, twelve hundred and thirty-six dollars, and expended in various ways thirty-one hundred and twenty-five dollars, and some bills of which the defendant kept no account; that the defendant

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and Safford abandoned the premises some time after November 8th, 1856, and had the ostensible control of the premises up to that time; that Downer did not sell or interfere with any of the personal property on his attachments; that at the time of the trade, Downer took a note of Tarbell for five thousand dollars, for demands given up to Tarbell at that time, and Tarbell gave Downer bank stock to that amount as collateral security; that the second note, of two thousand dollars, due in eight months, was exchanged with Downer by the defendant and Safford, in April, 1857, and two notes were executed to the Lebanon Bank for it, for Downer's convenience; that the defendant and Safford were embarrassed in making sales of the personal property on account of Downer's attachments, and that for that reason some of the wood lay in piles, till it became depreciated in value; that in less than two months from the time of the trade, the defendant informed the plaintiff that he had deceived the defendant and Safford, in regard to the transfers they received of him, and that he did not suppose they could ever pay their notes to him, and that they had nothing to pay with; that the plaintiff several times called upon the defendant and Safford to pay their notes, and that they refused to do so; that within a month from the time of the trade, and since that time, the defendant and Safford offered to pay the six hundred and twenty dollar note, which had been transferred to the Orange County Bank by the plaintiff, and give up all they had received of the plaintiff, and surrender the possession to him; that in the summer of 1856, the defendant told the plaintiff that his claim against the defendant and Safford was fraudulently obtained, but that they would be glad to settle almost any way rather than go to law, and would transfer all rights they had in the property, and give up the certificate of deposit in the South Royalton Bank; and at the time of the exchange of notes before mentioned, the defendant and Safford urged plaintiff to give up their notes, and they would give up said certificate of deposit to him, and restore to him all the mortgages and all the interest they had in them, which the plaintiff declined to do; that upon the day of the date of the note in suit the defendant paid two hundred dollars on the small note of six hundred and twenty dollars, and at its maturity he paid the

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balance to the Orange County Bank, and that the release before mentioned by the defendant and Safford to the South Royalton Bank was executed by them. It further appeared that the defendant had disposed of the fifteen hundred dollar mortgage on the Thayer farm for his own benefit.

There was no further testimony in the case on the part of the plaintiff.

The court instructed the jury that these facts did not constitute a defence to the note in suit, and directed a verdict for the plaintiff, to which decision and direction the defendant excepted.

C. M. Lamb and *Washburn & Marsh* for the defendant.

A. P. Hunton and *W. C. French* for the plaintiff.

BENNETT, J. This action is defended upon the ground that the note was obtained by the fraud of the plaintiff, he being at the time the note was given, the real owner thereof.

This note, with others, seems to have been given by this defendant and one Cyrus Safford for some mortgage interests, which the plaintiff held on lands in Braintree, Granville, and Roxbury; being a large amount of mortgages, and other things, not necessary now to specify particularly.

It is not controverted on this trial, but that the plaintiff was guilty of false representations in respect to the title of the lands conveyed to the defendant, and that he at the time knew them to be false, and that the defendant at the time of the trade supposed the representations to be true, and relied upon them.

The important question in this case is, whether there has been such a repudiation or rescinding of the contract on the part of the defendant, as to enable him successfully to defend against this action.

It is a common principle, that when one has a right to rescind a contract, and exercises that right, he must restore the other party to the same condition that he would have been in if no contract had been made; but a *defrauded party* does not lose his right to rescind because the contract has been in part executed, and the parties cannot be fully restored to their former position,

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but he must rescind as soon as the circumstances will permit; and he cannot go on with the contract after the fraud has been discovered, so as to prejudice the fraudulent party by the rescision being delayed. In other words, if a party rescinds, he must do it with all reasonable dispatch, upon discovering the fraud. How then are the facts in this case as applied to these principles?

We do not think the release by the plaintiff of his attachment against Tarbell can prejudice the defendant's right to rescind.

This release was a part of the contract, and it was a voluntary act on the part of the plaintiff, he at the time having full knowledge of his own fraud. The attachment created but an *inchoate* right, and by its release nothing passed to the present defendant which he can restore; and I apprehend the same may be said as to the release by the plaintiff of a portion of the Bliss farm mortgage. If there was nothing further in this case, we should find no difficulty in opening the case. But we have already said, that if a party rescinds on the ground of fraud, he must do it at once on discovering the fraud; but he is not bound to rescind; and if he still continues to act under the contract, it will be regarded as an election of his right, and a waiver of the right to rescind. In *Silway v. Fogg*, 5 M. & S. 83, there was a contract to remove certain rubbish for a *specified sum*, and it was found by the person who took the job upon commencing the work, that he had been deceived by false representations as to the quantity of the rubbish; but still he went on and removed it and then sought by reason of the fraud to recover more than the contract price; but it was held, that by his simply going on, he had waived all right to rescind and could only recover the price agreed to be paid. See also *Saratoga R. R. Co. v. Row*, 24 Wend. 74.

It is to be taken that the defendant was made aware of the fraud very soon after the contract was closed; but he did not then repudiate the contract and restore the property which he had gained by the contract, but held and used it as under his contract. The defendant was made aware of the prior mortgages on the property in two or three days after the trade, and this fact constituted the representation fraudulent; and yet the defendant went on and put it out of his power to restore to Downer what was still within his contract. He discharged mortgages, and

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created a new mortgage to the State Treasurer of thirteen hundred dollars, and took a certificate of deposit for that amount, and took possession of the personal property, and subsequently disposed of it, and he also assigned away for his own benefit the fifteen hundred dollar mortgage; and the first two thousand dollar note given under this contract, which matured at the end of eight months, was taken up.

We think, without going further into the facts, the testimony was ample to show an affirmance of the contract by the defendant after the discovery of the fraud; and it is well settled, that if after the discovery of the fraud, the party elects to go on under the contract, that is an affirmance of it, and concludes him from subsequently rescinding it.

We see no good and sufficient reason why this case must not be governed by those rules which are ordinarily applicable to the rescision of contracts.

If no part of the notes had been paid to Downer, the defence, if good for one note, would have been good for all.

It is altogether impracticable to settle the rights of the parties in this case, as the facts now stand, in actions upon the notes by any known principles of the law.

Judgment affirmed.

*ERASTUS PACKARD v. LORENZO SLACK.**Motion in arrest. Damages. Warranty.*

If a declaration in an action for the breach of a warranty in a sale allege both general and special damages, but do not allege the latter sufficiently to authorize their recovery, it will not be presumed after verdict, on a motion in arrest, that the jury included such special damages in their verdict.

In an action for a false warranty of the soundness of certain sheep sold by the defendant to the plaintiff, the declaration alleged special damages by reason of the communication of disease from the sheep sold, to other sheep

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of the plaintiff. *Held*, that it was not necessary, in order to recover such special damages, to allege or prove that the defendant knew at the time of the warranty that the plaintiff intended to mingle the sheep purchased with his other sheep.

CASE for the alleged false warranty that a hundred sheep sold to the plaintiff by the defendant were sound. The declaration alleged that the sheep so sold became of no value by reason of being infected with disease at the time of sale, and also that in consequence of being so diseased they communicated the infection to other sheep of the plaintiff, which became of no value for that reason. The declaration contained no allegation that the defendant knew when he sold the sheep to the plaintiff, that the latter intended to mingle them with his other sheep.

The cause was tried by jury at the December term, 1858, and resulted in a verdict for the plaintiff for forty-one dollars and fifty cents and costs. To the usual form of the verdict the following clause was added by the jury: "This goes upon the ground of the damage to the sheep that were sold, and to the others."

The county court instructed the jury that the defendant was liable for the injury to the other sheep belonging to the plaintiff caused by the communication of the disease from those sold by the defendant, if the latter knew that they were bought to be put with other sheep, and the disease was not communicated through the plaintiff's negligence.

After verdict the defendant moved in arrest of judgment on account of the insufficiency of the declaration, but the court overruled the motion to which the defendant excepted.

R. Lund and *J. Converse* for the defendant.

W. C. French and *A. Tracy* for the plaintiff.

POLAND J. If the plaintiff's declaration is defective, as the defendant insists, we think the defendant is not entitled to have the judgment arrested after a verdict upon it in favor of the plaintiff. The fraud, or deceit, or false warranty, set forth in the plaintiff's declaration, if proved, as it must be in order to entitle the plaintiff to a verdict at all, would entitle the plaintiff at least to recover for the diminished value of the sheep purchased of

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him by the plaintiff. This loss or damage to the plaintiff is of the character termed in the books *general damages*, and need not be particularly alleged in the declaration, except as it arises from the statement of the defect or disease in the sheep, which was necessary to be stated in order to allege the fraud, or false warranty of the defendant. The damages occasioned by the communication of the disease to other sheep of the plaintiff are of the character termed in the books *special damages*, and could not be recovered unless specially alleged in the declaration.

The defendant concedes that if the plaintiff established the cause of action set forth in his declaration, as he must in order to recover at all, he would be entitled to recover something as *general damages*; but he insists that the allegations in the declaration are not sufficient to entitle him to recover for the special damages claimed, because it is not averred in the declaration that the defendant *knew* when he sold the sheep to the plaintiff that the plaintiff intended to mingle them with other sheep, to whom those sold might communicate the disease with which they were affected.

Granting all this, the proper mode of reaching the difficulty is not by a motion in arrest. If the special damages are not of a character that the plaintiff is legally entitled to recover, either because they are too remote, or because they are not sufficiently set out in the declaration, it will not be intended after verdict that the plaintiff was allowed to recover them. If the plaintiff attempts to recover for such special damages at the trial, the proper mode of raising the question is to object to the admissibility of the evidence, or to the instructions to the jury, or both.

It has never been supposed that when under a declaration the plaintiff would be entitled to general damages, that such declaration was made defective even on demurrer by alleging special damages, even where they were confessedly such as the party could not recover. We are not aware of any case in which a declaration containing a single count has been held defective on a motion in arrest, when the same declaration would have been good on demurrer, and we think no such case can be found. Very many defects in declarations which would be bad on demurrer, are cured by verdict, and cannot be raised by a motion in arrest.

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In a case where the plaintiff would not be entitled to recover at all, except by proving the special damage alleged; (like some actions of slander) and the damage alleged in the declaration was such as the party was not legally entitled to recover for, then the declaration would be bad either on demurrer or in motion in arrest after verdict. But we are all agreed that the declaration is not defective in the particular claimed, and that it was not necessary for the plaintiff to allege or to prove that the defendant knew he intended to mingle the sheep purchased with others who might thereby contract the contagious disease with which these were affected. The rule as to what damages can be recovered is laid down to be the *natural* and *proximate consequence* of the act complained of.

Now was this result, or consequence, a natural one, one that might reasonably and ordinarily be expected from selling a flock of sheep infected with a contagious disease? Everybody understands that these animals are commonly and usually kept in flocks or herds of considerable numbers, and often of very large numbers, that they are rarely if ever kept separate, that they are short lived, and far more subject to constant shift and change than any other species of domestic animals. If the plaintiff sustained some peculiar or special loss on account of this disease of the sheep, by his putting them to some new and unusual use, which the defendant could not reasonably have expected or anticipated would or might be done, then he would not be liable for such special damage unless he knew of such intended object or use to be made of them when the trade was made. But the placing these sheep with others was one of those natural and ordinary acts and modes of using such animals, that the defendant might reasonably expect it would or might be done, and that as he knew they had a contagious disease, they would thereby communicate it. He was therefore liable for such consequence or damage, though not expressly informed that such use was intended by the plaintiff.

The only error we discover is that the defendant had the benefit of instructions to the jury much more favorable than he was entitled to.

Judgment affirmed.

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BENNETT M. PRATT v. EDMUND L. PAGE AND RUFUS BUCK.

Partnership. How far the supreme court will presume that the county court inferred the existence of facts in rendering judgment upon an auditor's report.

In book account against P. and B., it appeared that the services and articles charged were rendered and furnished by direction of P. alone, but the plaintiff claimed that the defendants were co-partners, and jointly liable therefor. The auditor found that the defendants were not co-partners when the plaintiff's account accrued, but that they had been in partnership until a short time previous, that their co-partnership was notorious in their neighborhood, that no notice of its dissolution had been given by publication or otherwise, that P. continued the same business at the same place after the dissolution, and that the plaintiff rendered the services and furnished the articles charged in connection with such business. The county court rendered judgment upon the auditor's report against both defendants. *Held*, that the facts found by the auditor were not sufficient to warrant the county court in rendering judgment against the defendants as co-partners, but that to establish such liability it must also appear: 1st, that the plaintiff, at the time the contract was made under which his account accrued, knew that the defendants had been in partnership: 2d, that he was ignorant of their dissolution: and 3d, that he made the contract supposing he was contracting with the defendants as partners, and in reliance upon their joint liability.

Held, also, that the supreme court would not presume that the county court inferred from the facts reported by the auditor, such other facts as were necessary to sustain their judgment.

The supreme court will not, for the purpose of sustaining the judgment of the county court upon an auditor's report, presume that the court found any facts besides those reported, except such as are fairly to be inferred from them.

The case of *Barber v. Britton & Hall*, 26 Vt. 112, questioned so far as it deviates from this principle.

BOOK ACCOUNT. The plaintiff's account was for his labor from October 4, 1852, to January 17, 1853; and for a few bushels of oats furnished in November and December 1852. The auditor reported that the account was correct as to amount, and that the defendant Page hired the plaintiff to do the work charged, and that the oats were delivered by the plaintiff to him. The plaintiff claimed that the defendants were partners when the account accrued, and were jointly liable therefor. The auditor found that in fact they were not then partners, but that they had

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previously been in partnership in the business of buying and slaughtering cattle, and selling meat in the town of Reading and vicinity, after the usual manner of country butchers; that this co-partnership commenced in the fall of 1851; that the cattle were bought sometimes by one partner and sometimes by the other, and sometimes by both together; that Page had mostly superintended the sale of the meat; that their business was carried on until November, 1851, at Buck's residence, and afterwards at Page's residence in the same town, until sometime in the winter of 1851-2; that several cattle were kept through that winter by the defendants jointly, and that some of them remained on hand until the following winter; that some of these were slaughtered by Page and some were sent to market; that Buck took one pair home to his place, and that one or two of them were slaughtered by Page and their meat sold by him after the plaintiff began to work for him; that Buck ceased in fact to have any interest in the business of buying and slaughtering cattle after May, 1852, with the exception of the few remaining on hand, as above stated; that Page, however, continued to carry on the same business at the same place, with Buck's knowledge, until after the plaintiff's account accrued; that though their partnership had been open and public, yet no notice of its dissolution was given by publication in a newspaper, or otherwise; that the plaintiff's account was for services rendered and articles delivered in connection with the butchering business above described; and that Page told the plaintiff, while in his employment, that Buck was his partner.

Upon this report, the county court, at the December term, 1857,—REDFIELD, Ch. J., presiding,—rendered judgment for the plaintiff against both of the defendants, for the balance due upon his account, to which the defendants excepted.

S. Fullam, for the defendants.

Washburn & Marsh, for the plaintiff.

PIERPOINT J. It is insisted in this case that the plaintiff is entitled to recover against the defendants as co-partners.

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It appears from the report of the auditor that in the fall of 1851 the defendants entered into co-partnership in the business of buying and slaughtering cattle, and selling meat in Reading and the adjoining towns, and continued their business until May, 1852, when they dissolved their co-partnership, and the defendant Page continued the business alone; that in the fall of 1852 the plaintiff hired out to the defendant Page, to labor for him by the month, and worked for him three months; and that during this period he let Page have the oats charged in his account. The main question before the auditor was, whether the defendants were co-partners, in fact, at the time the contract with Page was made, and the property delivered. The auditor has found expressly that they were not. But it is claimed that having been co-partners prior and up to May, 1852, and that generally known in the vicinity, and not having given notice by publication, or otherwise, of their dissolution, the plaintiff has the right to treat them as co-partners, at the time he made his contract with Page, and hold them both responsible for his services rendered for, and the property delivered to, Page.

Do the facts reported by the auditor sustain this claim?

The general principle is not questioned, that where a co-partnership has existed, and has been publicly and generally known to exist, persons having a knowledge of the fact, and who deal with the members of the company as with the copartnership, supposing them to be still co-partners, and relying upon the responsibility of the company, can hold them liable as co-partners, notwithstanding the co-partnership may have been in fact dissolved, unless they have given such notice of the dissolution as the law requires to discharge them from such responsibility.

The auditor has found the existence of the co-partnership, the general notoriety of the fact in the vicinity, and the dissolution, without publication, in May, 1852. What more is necessary to entitle the plaintiff to hold them responsible as co-partners on the contract he made with Page in October, 1852, some five months after the dissolution?

1st. He must, at the time he made the contract, have had knowledge of the existence of the co-partnership. On this point the report is entirely silent, and there is no fact reported from

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which his knowledge can be inferred. The fact that it was generally known in the vicinity amounts to nothing, until the plaintiff is brought into the circle within the limits of which this knowledge existed, and it does not appear from the report that the plaintiff was ever in the vicinity of this transaction until the day on which the contract was entered into.

2d. If he knew of the existence of the co-partnership, then it must appear that he did not know of its dissolution at the time he made the contract. Here again the report is silent.

3d. It must appear that the contract was entered into by the plaintiff with the understanding that he was contracting with the company, and upon their faith and credit.

The auditor has found no fact of this kind, nor anything from which it can be fairly inferred; but on the other hand, he finds that the plaintiff contracted with Page and delivered the property to him, without anything having been said in relation to the co-partnership, or any allusion to Buck as a party to the transaction, or as having any connection therewith, or interest in it. It does not appear that any communication ever took place between the plaintiff and Buck, or that Buck had any knowledge that the plaintiff had been employed by Page.

Therefore we are at loss to see upon what ground the plaintiff can be entitled to a judgment, by reason of the facts reported by the auditor. We regard them as wholly insufficient to warrant this court, or the county court, in rendering a judgment in his favor.

But it is insisted that as the county court rendered a judgment in favor of the plaintiff, this court will presume that the county court inferred from the facts reported by the auditor, all such other facts as we may think necessary to sustain that judgment.

It has been long settled in this State that this court, in questions arising on the reports of auditors, will, in certain cases, presume that the county court inferred the existence of a certain fact, or facts, from the facts found by the auditor, when their existence is necessary to sustain the judgment which they have rendered, and when the auditor has not expressly found such facts. But we are not aware that any attempt has been made to establish any rule by which the county court is to be governed in

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drawing its inferences from the facts found by the auditor, or the circumstances under which this court will presume the county court to have made such inferences. It would seem that there must be a limit, and a somewhat narrow one; for if this court is to presume that the county court has inferred all the facts not found by the auditor that are necessary to sustain the judgment of the court below, it would be idle to bring cases of this character before this court, when the result must always be an affirmation of the judgment.

If then there is a limit to these presumptions, what is that limit, and what are the facts which this court will presume that the county court have inferred from the facts reported by the auditor?

We think the only true answer is, that this court will presume that the county court inferred such facts as necessarily, or fairly, result from the facts found by the auditor; such as are the fair and legitimate conclusions to be drawn therefrom; such as this court can see from the report the auditor ought to have expressly found, but which he has omitted to find, and the existence of which is necessary to warrant the judgment below, and which, from the fact that such judgment was rendered, we presume that the county court inferred. It is, in short, to give the full, perfect and legal effect, to the facts found and reported by the auditor.

This doctrine I think is fairly to be drawn from the decisions in this State. In the case of *Emery v. Tichout*, 13 Vt. 15, Judge COLLAMER makes use of the following language: "Though an auditor's report is in the nature of a special verdict, yet the court may infer from the facts found whatever is a fair and legitimate conclusion, without recommitting it to the auditor for that purpose.

In *Stone v. Foster*, 16 Vt. 546, the principal question in the case was, whether one Shedd was the agent of the defendant or not. The auditor reported the facts and submitted the question to the court, who rendered a judgment for the plaintiff. In deciding the case the court say: "The auditor has not found in express terms that Shedd was the agent of the defendant, and we think the county court would have been justified in rejecting the report for that reason, but as the report was not rejected, and as the auditor has found such facts as constitute

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an agency, it is not necessary now to recommit it." In this case the court say in substance, that although the fact of agency is not found expressly, still, as that fact arises on the face of the report, as the necessary result or conclusion from the facts found, the county court might well say that the fact existed. And we will presume they did so.

The case of *Birchard & Moulton v. Palmer*, 18 Vt. 203, was one where the defence set up was that the defendant contracted, as a co-partner, with his brother, and not in his individual capacity. The auditor reported that the account was charged to the defendant alone, on the plaintiffs' book; that it did not appear that the plaintiffs knew of the co-partnership, or supposed that they were dealing with any other person than the defendant, and that when this account was presented to him, he did not object to its having been charged to him alone, and referred the question to the court, whether, on these facts, the defendant was liable. The county court rendered judgment for the plaintiff.

Ch. J. WILLIAMS, in delivering the opinion says, "when the county court, instead of recommitting a report, undertake to decide any question of fact, or to draw any inference of fact arising on the report, its decision is final;" and cites the case of *Stone v. Foster*, above referred to. He says, further, "there was evidently testimony enough in this case to justify the auditor, or the county court, in determining that the plaintiff contracted with the defendant alone." He also says, that "in all cases where an auditor, instead of finding the facts, refers them to the court, the court should recommit, or reject the report; but in this case, the court having rendered a judgment for the plaintiff, and as both the auditor and the court have found the defendant accountable to the plaintiff, we see no reason for disturbing the judgment;" thus placing the decision expressly upon the ground that the facts reported by the auditor, and the fact that necessarily arose therefrom, that is, that the contract was made with the defendant alone, showed that the plaintiff was entitled to recover.

So that the decision in this case, as in that of *Stone v. Foster*, was placed upon the ground that the fair and legitimate conclusion, to be drawn from the report itself, would be in favor of the decision below, and that this court, in revising that decision, will

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presume that the county court drew the proper inference therefrom.

If the county court finds the existence of facts, and places them upon the record, its finding is conclusive, and this court must take the case as it is sent to it.

But when the court below is silent on the subject, and only sends up its decision, accompanied by the report on which it was based, this court will only presume in aid of its judgment, that it inferred such facts from the report as on an examination of it it can see that the county court ought to have inferred. It is not sufficient that the facts reported may have *some* tendency to establish the required fact, for in that event, as has been before remarked, it would be idle to bring cases of this kind here, for we apprehend that but few cases arise in which there can not be something found in the report tending to sustain the decision below.

In the case of *Barber v. Britton & Hall*, 26 Vt. 112, the question was, whether the defendant was liable to the plaintiff for services rendered by him, as a physician, to a boy who was injured while in the employ of the defendants. It appears from the report that the defendants sent word to the plaintiff to "come and see the boy and ascertain if he was being properly treated by the attending physician, and that they would pay him for the visit." Their messenger did not do the errand as directed, but told the plaintiff that the defendants wanted him "to go and see the boy and attend him carefully, and see him through with it, and the defendants would pay the bill." The plaintiff, relying upon this, visited the boy and from time to time took charge of and attended to him until he recovered. The defendants knew that the plaintiff was attending upon and taking charge of him during the period of time that the account was accruing.

The county court rendered judgment on the report for the plaintiff. The supreme court, after affirming the judgment on the ground that the defendants must be considered responsible for the manner in which the messenger delivered the errand, proceeded to say that the judgment ought to be affirmed on another ground: and the learned Judge who delivered the opinion says, that the evidence tended to prove a ratification, by the defendants,

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of the acts of their agent, and that the county court may have decided the case by inferring a ratification from the facts found by the auditor, and if the county court, instead of recommitting the report for a more explicit finding of facts, draws its own inferences arising from the facts specifically found by the report, its decision is final; and cites *Birchard et al. v. Palmer*, 18 Vt., and then says that "if necessary to sustain the judgment below, this court will presume the county court drew such inferences, if the contrary does not appear."

We think it apparent that it was not the intention of the court in this case, to vary the principle recognized in *Birchard v. Palmer*, and *Stone v. Foster*, but it is perhaps more than doubtful whether the facts that are made to appear in the case are such as to warrant the application of this principle. It appears that the defendants knew of the plaintiff's attendance upon this boy, but there is nothing in the case to show that the defendants had any knowledge but what the message was correctly given, or what message had been delivered, but the whole case proceeds upon the ground that they did not know. How then can it be said that, from the facts in the case, the inference can be drawn that the defendants ratified the act, when it also appears that they had no knowledge of the act itself? If the case had shown that the defendants knew what message had been delivered in their name, then the inference that the defendants had ratified the act would naturally have arisen, and the supreme court would have been well warranted in presuming that the county court inferred it, if necessary to sustain the decision below. But as the case appears, for the supreme court to have presumed that the county court inferred a ratification, would be to presume that they had committed a plain and obvious mistake, and drawn an inference not warranted by the facts found. And we apprehend that it is not the duty of the supreme court to presume an error of this kind, which it has not the power to correct, to avoid deciding that the court below had made a mistake in a matter of law, which it was their duty to rectify. In the case of *Wills & Fairbanks v. Judd*, 26 Vt. 617, the court says that "upon a report of auditors, and especially of a referee, all inferences of fact are to be made, and can only be made by the court to which the report is returnable,

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and after such court has rendered judgment upon the report, if their judgment can fairly be sustained by any inferences of fact they might have drawn from the report, it is the duty of a court of error to presume they based the judgment upon such inference."

This is in accordance with the rule which we have before stated; it is only saying that if any inference can fairly be drawn from the report that will sustain the judgment, the court will presume it to have been done, for it can hardly be said that a judgment is fairly sustained that is made to rest solely on the presumption that the county court inferred a fact from the report that does not fairly arise from the facts reported.

The supreme court will only presume the county court to have done that in this respect which, upon an examination of the facts reported, it is apparent they fairly ought to have done. In all cases of this kind it is to be borne in mind, that the supreme court has before it all that the county court had on which to base their decisions. And we think there is far less danger in adhering to the facts as found, and the fair and legitimate conclusions arising from them, as they are certified to us by the county court as the basis of our decision, than to *presume* that the county court have *inferred* the existence of other facts, not fairly to be presumed from the facts found, and of the existence of which that court has not seen fit to inform us.

In this case we are unable to find anything in the report to warrant us in presuming that the county court inferred any of those facts which, as we have before shown, must have existed to entitle the plaintiff to a judgment against the defendant Buck.

The result is, the judgment is reversed, and judgment is rendered for the amount found due against Page, and judgment in favor of Buck for his cost.

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SOLOMON DOWNER v. DANIEL TARBELL, JR., and Trustee
DANIEL KELSEY. JOHN LONGEE, Claimant.

Trustee process. Promissory note.

K. executed a note to T., the consideration of which was T's agreement to pay an equal amount of K's debts to his creditors. T. transferred the note to K. H. & Co., as collateral security for a debt due them from him, and they immediately gave K. notice of the transfer. The plaintiff subsequently sued T. and trustee K. Afterwards T. fraudulently procured the note from K. H. & Co. without paying their claim, and transferred it for a full consideration to L., the claimant, who took it supposing it to be free from any lien whatever, and notified K. of its transfer to him. When K. made his disclosure in the trustee suit, T. had not paid all the former's debts which he had agreed to pay, but he did so before the case was disposed of in the county court. *Held*, that the trustee was chargeable for the balance of the note, after deducting K. H. & Co's claim against T.

TRUSTEE PROCESS. The facts in the case are sufficiently stated in the opinion of the court.

The county court at the May term, 1858, Redfield Ch. J. presiding, adjudged the trustee liable for the amount of the note in question, after deducting the sum due from Tarbell to Keith, Hyde & Co., to which the claimant excepted.

Converse & French, for the claimant.

Washburn & Marsh, for the plaintiff.

BARRETT J. The only question to be decided is, whether the claimant is entitled to hold, as against the plaintiff, the note given by Kelsey to Tarbell, and by Tarbell sold and endorsed to the claimant. The rights of Keith, Hyde & Co., as claimants against the plaintiff, have already been adjudicated, and no controversy as yet exists between them and the present claimant touching their respective rights in regard to the note.

A comprehensive summary of the facts is, that Kelsey, the trustee, on the 15th day of March, 1854, gave to Tarbell the note in question payable on demand. The consideration for the note was Tarbell's undertaking to pay an equal amount of debts owing by the trustee to various persons, his creditors. In April, 1854, Tarbell transferred the note to Keith, Hyde & Co., as col-

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lateral security for a debt of \$787.50, who gave due notice to Kelsey that they held the note.

The process in this suit was served July 17, 1854. In October, 1854, Tarbell, having paid the debt to Keith, Hyde & Co., except about \$139, succeeded by means adapted to his purpose, but which operated as a fraud upon them, in getting the note back from them into his own hands, and then transferred it to Longee, the claimant, for full consideration, who took it in good faith, supposing it to be free from any lien by reason of this process.

The commissioner does not find whether the debts which Tarbell had assumed to pay as the consideration of the note, had been paid at the time Kelsey made his disclosure in August, 1855, but does find that the trustee did not understand that any but the debt to Hiram Moor, of about \$900, had then been paid. From the final disclosure made by the trustee at the December term, 1857, it appears that all of said debts had been paid, or at least that the trustee had been released from them. In December or January next after the claimant received said note from Tarbell, he notified the trustee that he held the same.

The case of *Fay v. Smith*, 25 Vt. 610, seems to have settled the right of the plaintiff to pursue by trustee process the note in the hands of Keith, Hyde & Co., for the excess above the debt for which they were holding the note as security. The general property of the note remained in Tarbell. K., H. & Co. were holding it as a pledge, with an interest in it commensurate with their debt. The right of the plaintiff, created by the service of the trustee process, attached to the debt evidenced by the note, and fastened upon whatever interest Tarbell had in it, in subordination to the right of the holders in pledge. As Tarbell should reduce the debt for which the note was held as security, by so much would the amount of his interest in the note be increased. If, upon full payment of his debt to K., H. & Co., he had received back the note from them, it would then have been in his hands the same as if it had never been pledged to them. The absolute title to it would have been in him, and in no way affected by the fact of its having been pledged. If he had continued to hold the note down to the time of the judgment in the county court, it can hardly be questioned that it would have been subjec-

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ted to this process for its full amount, unless the trustee himself had shown matter to prevent such a result. But the trustee is not interposing between the plaintiff and the debtor.

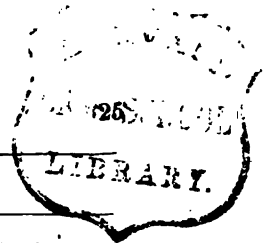
In whose right does the claimant stand before the court in reference to the note? He received it of Tarbell, subject in Tarbell's hands to the pending trustee process. He was informed of this process before he took it of Tarbell, but was led to suppose that by reason of the note being in the hands of K. H. & Co. at the time of service, the process would be ineffectual to hold it. It is needless to discuss how far this would fall within the rule as to ignorance of the law, the facts being known, or how far the claimant would be exposed to the operation of the doctrine of *lis pendens*. If he had received the note before this process had been served on Kelsey, and had given due notice that he was the holder of it, he would now stand on clear ground. If he had received the note from K., H. & Co. it might be plausibly argued, and perhaps successfully, that he was holding it with the full effect and benefit of the notice given by them of the transfer by Tarbell to them, and the case of *Britton v. Preston*, 9 Vt. 257, might have given countenance to this view. And still we do not design to intimate that it might not have been a question of some difficulty whether that notice would inure to a subsequent holder to any greater extent than it would have been operative in favor of K., H. & Co. under the circumstances, and in reference to the purposes for which they held the note.

It seems to us that Mr. Longee, the claimant, took the note burdened with the lien or right to which it was at the time subject in the hands of Tarbell, and that it still remains thus burdened. If, when Tarbell received back the note from K., H. & Co., the plaintiff's right by virtue of this trustee process attached upon it to the full extent of Tarbell's interest in it, we are unable to see how anything that Tarbell should thereafter do with, or in reference to, the note, could affect the plaintiff's right acquired by the service and pendency of this process.

The learned counsel for the claimant makes a point that the plaintiff is not entitled to hold of the note an amount beyond what had been paid by Tarbell on the debts of the trustee at the time of the disclosure before the commissioner in August, 1855,

FEBRUARY TERM, 1859.

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that the disclosure made at the December term, 1857, is not to be treated as a disclosure, and that the rights of the parties must stand upon the facts set forth in the disclosure and commissioner's report made in August, 1855, and that at that time Tarbell had paid only \$900 of what he was to pay as the consideration of said note. As to this, it may in the first place be remarked, that as the trustee is not contesting his liability on the note, it does not seem to be material whether we treat that answer to the interrogatory at the December term, 1857, as being a *disclosure* or not. The trial in the county court was proceeding upon the claim made by the claimant. The trustee's disclosures and the commissioner's report were not a proceeding to which the claimant was a party. Their only purpose was to fix the trustee's liability to pay the note. If they were used on the hearing between the plaintiff and claimant, they were so used by consent, and merely as evidence of facts properly in issue, that affected the relative rights of the plaintiff and claimant.

The fact shown by that answer was that the debts had been paid by Tarbell that he undertook to pay as the consideration of the note. But the exceptions show that "it was conceded that Tarbell had paid the debts which constituted the consideration of the note in question." This fact being thus conceded rendered that answer of no importance for any purpose in the trial of the claimant's claim. It was the legal effect of the fact thus conceded that the court had to consider.

In the next place, it is difficult to see how this claimant can legitimately raise any question as to the consideration upon which the note was given. The trustee acknowledges the note to be valid against him. The only question is, who is entitled to the pay—Downer by virtue of his trustee process, or Longee by virtue of the transfer of the note to him by Tarbell? The determination of this question cannot depend upon, or be affected by what has taken place between the original parties to the note. In this controversy both the plaintiff and the claimant claim from the same source. The question is, which has the prior and better right.

It cannot affect the right of the plaintiff accruing in virtue of his trustee process, that Tarbell and Kelsey represented to the

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claimant that the note was due, and that it was unaffected by this trustee process. The plaintiff was not in any way participating in such representations. Any fraud, or misinformation, or incorrect opinion that they may have brought to bear on the claimant, and thereby have induced him to take the note and pay full consideration for it, does not affect the plaintiff's right, nor does it place the claimant in any position of advantage as against the plaintiff.

In any view we are able to take of the case, we think the judgment of the county court is correct, and it is therefore affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORANGE,
AT THE
MARCH TERM, 1859.

PRESENT:
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. LUKE P. POLAND, } ASSISTANT JUDGES.
HON. ASA O. ALDIS,

JOHN RICHARDSON, *Administrator of the Estate of JOHN W. MERRILL, Appellee, v. THE ESTATE OF JOHN W. MERRILL, ALDEN SPEAR, AND OTHERS, Appellants.*

Administrators. Probate Court. Separate property of married women.

The widow of an intestate petitioned the probate court to assign her so much out of the estate, as she was entitled to for her maintenance during its settlement. The probate court assigned her absolutely eight hundred dollars in money, and the use of the real estate and household furniture during the settlement of the estate. This assignment was not appealed from. *Held*, that under this decree the administrator was entitled to be allowed, in the settlement of his account, a charge of eight hundred dollars paid by him to the widow for her support.

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Held also, that the fact that such assignment to the widow was an extravagant or unreasonable one, did not affect its validity, so long as it was unappealed from, and that it could not be revised in a collateral proceeding like the settlement of the administrator's account.

In the settlement of an administrator's account, he is entitled to be allowed for money paid by him in liquidation of a claim which could have been enforced against him either at law or in equity.

The wife of the intestate received during coverture certain personal property by gift and inheritance, and also acquired some money by her own personal earnings. The intestate always regarded all this as his wife's separate property and allowed her to treat and control it as such. The property was during coverture reduced to money, and all her money was then loaned and notes taken therefor in the husband's name, but they were always regarded and treated by him as her separate property, and she kept them in a separate parcel and room from those belonging to him. Shortly before the intestate's death, his wife being about to leave home temporarily, left her parcel of notes in her husband's care for safe keeping, and they were found among his papers by his administrator, and inventoried by him as belonging to the intestate's estate, the widow, however, claiming them as her own.

Held, that as against the heirs of the husband, these notes were in equity the sole property of the wife, and the administrator was therefore allowed, in the settlement of his account, to credit himself with their full amount, which he had realized and paid over to the widow.

APPEAL from the decree of the probate court settling the account of the administrator of John W. Merrill's estate. The appeal was taken by the heirs of the intestate. The cause was referred to a commissioner to take the account of the administrator, who reported the following facts:—

Nancy Merrill, the widow of the intestate, was married to him in 1836. In 1837 her father gave her four cows, fourteen sheep, and a horse, and told her to keep them as her own and for her own benefit. This gift was made to her with the knowledge and consent of her husband, who took the property into his possession and used, kept and supported it and its offspring precisely as he did his own stock, but both he and his wife always called and considered it her property. None of this stock was ever sold or let without the wife's consent, and all the rents and proceeds derived from it were considered to belong to her. She also at one time bought a calf which her husband kept in the same manner as her other stock, and when it was sold she had the

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proceeds of it. Her father also gave her a note against a third person for one hundred twenty-five dollars, which was afterwards paid to her with interest. She also received from the division of her father's estate two hundred seventy-one dollars and twenty-five cents. Her husband also gave her small sums of money from time to time, and on one occasion fifty dollars, which he said was her portion of the proceeds of butter, pork or poultry, which he considered she was entitled to, as she had done the principal part of the work in raising and making this produce.

Mrs. Merrill kept her money and notes separate from her husband's, and in a different room, and he had nothing to do with them without her consent. The money was kept at interest as much as possible, and whenever either of them had any of the other's money, as they occasionally did, it was accurately accounted for. The notes and mortgages which were taken for the loans of her money, were always taken in Mr. Merrill's name, and her name did not appear in them. This was done by agreement between her and her husband, because they considered that it would be more convenient to institute suits for the collection of these loans in his name than in hers. Her husband assisted her in loaning her money whenever opportunities offered.

A short time before her husband's death, Mrs. Merrill went away from home, and she then delivered to him her bundle of notes to keep till she returned. This was her usual custom whenever she left home. While she was absent he was taken sick, and died soon after her return. His administrator found this bundle of notes among the papers of the intestate, but the widow then and ever since claimed them as her own. These notes all arose from loans of money, growing out of the property given to her by her father, and received and treated by her and her husband as her own property, as above mentioned, and amounted in the aggregate, including interest, to about one thousand dollars. The administrator returned all of them in his inventory of the intestate's property to the probate court, but he finally paid to the widow one thousand dollars for them, they being all perfectly good and secure, and credited himself with that amount in his account. The appellants objected to the allowance of this item, and also to the allowance of another item of eight hundred dollars cred-

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ited to the administrator for cash paid the widow "for her support as per order or assignment of the probate court."

The record of the probate court in regard to this item showed that on the 9th of October, 1855, a petition was presented by the widow representing that the estate was solvent and had a large amount of personal property belonging to it, and praying the court to assign her so much out of it as she was entitled to for her maintenance during the settlement of the estate, according to her circumstances, to be by her selected from the household furniture and other articles named in the appraisers' report at their appraised value. The record also showed that on the 13th of November, 1855, the order of notice issued upon this petition of the widow, was returned complied with, that no one appeared to object to granting the prayer of the petition, and that the court thereupon set apart and assigned to the widow out of the estate of the intestate the sum of eight hundred dollars in money (and also the continuous use of the real estate and the use of the furniture towards her support during the settlement of the estate) to be held by her and her heirs, executors, administrators and assigns, to her and their own use forever.

Upon the foregoing facts the county court disallowed the item of one thousand dollars in the administrator's account, and held him chargeable for the amount of the notes claimed by the widow, and allowed the item of eight hundred dollars.

The appellants excepted to the allowance of the eight hundred dollar item, and the administrator excepted to the disallowance of the one thousand dollar item.

C. W. Clarke, for the appellant.

1. All the property given to Mrs. Merrill by her father, except the note against Spear, became her husband's property immediately upon its delivery. *Rawlins & Wife v. Rounds*, 27 Vt. 17; *Reeves Dom. Rel.* 1; 2 *Kent's Com.* 143; *Richardson v. Daggett*, 4 Vt. 336.

This note was afterwards paid by Spear, and the money paid upon it became immediately the husband's property.

The money given by Merrill to his wife from time to time, and the increase of the stock never became her property, since no

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property can pass from the husband to the wife, by sale or gift, except through the intervention of trustees, even in equity. *Mews v. Mews*, 2 Eng. L. and Eq. 556; 2 Kent's Com. 129; *Washburn v. Hale*, 10 Pick. 429..

The act of loaning the money and taking security to himself was, both in law and equity, a complete reduction to possession by the husband. *Searing v. Searing*, 9 Paige 287; 2 Kent's Com. 141; *Kendrick v. Cleveland*, 2 Vt. 329.

The husband can not be regarded as a trustee for his wife in respect to this property and money, because he could have received his appointment as such only from his wife, and such an appointment being of the nature of a contract between them, is not recognized either in law or equity.

2. As to the item of eight hundred dollars, the record fails to show any notice at all of the hearing upon the widow's petition to the appellants. They were entitled to notice, and for want of it the assignment is void. The assignment by the probate court to the widow does not follow the petition.

It is also unreasonable.

A. S. Little and Peck & Colby, for the appellee.

1. The estate of Merrill is solvent. The creditors have no interest to be affected by this controversy. The question is between the widow and heirs, or more properly speaking, between the administrator and heirs, the administrator having submitted to and paid the claim of the widow. At law, the title to the property in question was in the intestate. He might have assumed the control and disposition of it. This he did not do, but treated it, at all times, as his wife's property. He waived all claim to it, and died without asserting any. The transaction amounted to a gift by the husband to the wife, which equity will support as against the heirs.

Mead v. Mead, 24 Vt. 601—Note; *Porter et al. v. Rutland Bank*, 19 Vt. 411; *Pinney v. Fellows et al.*, 16 Vt. 525; *Slanning v. Style*, 3 P. Wms, 385; *Lucas v. Lucas*, 1 Atk. 270, and 3 Atk. 393, 394; *Phelps v. Phelps*, 20 Pick. 556; *Stanwood v. Stanwood*, 17 Mass. 57; *Roper's Husband and Wife*, 2d Vol., 131, 136; *Clancy's Rights of Women*, pp. 274, 275—2d ed.; 2

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Kent's Com. 163—3d ed.; 2 Story's Eq., sec. 1887; *U S. v. Cutts*, 1 Sumner 133; *Herr's Appeal*, 5 Watts & Serg't 494, and 6 Law Rep., Jan. No., 1854.

2. This claim for payment to the widow of the \$1,000, for the notes, should have been allowed the administrator. He has done what chancery would have compelled him to do. The rule is that what the court would allow upon a suit, shall be good without suit. *Balsh v. Higham*, 2 P. Wms 453; *Hill on Trustees*, 571—1st ed. Executors and administrators hold the property in trust for those entitled. They are trustees, and their acts are to be supported so far as it can be done without violating any settled rules of law. The probate court has jurisdiction of this matter so far as relates to the administrator's account. The widow is not the party before the court. She is not asking relief. Her claim has been paid by the administrator, and the question is, was he justified in making the payment? If the property belonged to the widow, either at law or in equity, it was his duty to pay, and thus save the estate the expense and delay of a chancery suit. This court, on appeal from the probate court, has frequently exercised the jurisdiction now claimed for the probate court. That court has both a legal and equitable jurisdiction.

Mead et al. v. Byington et al, 10 Vt. 116; *Clark, Adm'r v. Heirs of Clark*, 21 Vt. 490; *French v. Wisner*, 24 Vt. 402; *Jennison v. Hapgood*, 10 Pick.; *Herr's Appeal*, 5 Watts & Serg't 494; *Robinson v. Swift Adm'r*, 3 Vt. 283.

3. The item of \$800 was properly allowed the administrator. Taking the whole record together, it is very evident that this sum was assigned to the widow for her support during the settlement of the estate. Whether the same was reasonable or not, is a question that cannot now be raised. No appeal was taken from the decision of the court making the assignment, and all parties are necessarily concluded.

REDFIELD CH. J. I. The first question made is in regard to the payment by the administrator of \$800, in conformity with the decree of the probate court, unappealed from. There would seem to be no reason to question the regularity of this payment, unless upon one of two grounds.

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1. That the payment was not in conformity with the decree.

2. That the decree itself is void.

1. In regard to the first ground there seems no reasonable question. For even if the administrator, in making his charge as a payment for the support of the widow, mistook the legal effect of the decree, it would be no sufficient ground of disallowing the payment. If the decree is a valid decree and so described in the plaintiff's account as to be identified, it is all that is requisite. This ground is not urged in argument. The counsel, in argument, rely wholly upon the second ground, and that the assignment is unreasonable, which, if it is any ground of objection to the decree, must be, as a reason why the decree should be held void.

2. But in regard to this second question, we are not prepared to say that there is any sufficient reason to hold the decree void. Its intrinsic extravagance, or unreasonableness, if that appeared to the greatest supposable extent, is no ground of holding the decree itself void, when it is brought in question in this collateral manner. If the appellants desired to raise any such question, they should have carried the case, by appeal, into the county court where it could have been revised upon its original merits in the same manner and to the same extent as in the probate court. But there being no appeal taken the decree became binding to the same extent as any other judgment.

The petition, which is for an assignment out of the personal estate of the deceased, "for maintenance during the settlement of the estate," should be taken into account, most unquestionably, in giving a construction to the decree. In this view, there could be no question that the decree is to be regarded as made for the purpose specified in the petition. And it is not possible for us to determine with absolute certainty that there is any manifest absurdity in the sum assigned. We are not sitting to revise the facts. There are, no doubt, cases where such an assignment might not seem unreasonable. But, as we have before said, this question cannot be revised here, in this mode. The decree must be held valid, and the payment of the amount, by the administrator, strictly within the line of his duty.

II. In regard to the payment of the \$1000, the question must

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turn upon the validity of the claim of the widow. That is, whether it was a claim which might have been enforced against the administrator, either at law or in equity. For if it was such a claim, it could not with any show of propriety be urged that the administrator is liable here to account, and to be charged with the very money which he paid in liquidation of a claim he could not have successfully resisted. The only remaining inquiry in the case then is, whether the widow was, in law, or in equity, the owner of this property in payment for which this sum was disbursed by the administrator?

There would seem to be no question, from the facts reported, that she claimed to be the owner of this property and that this claim was always recognized by her husband, the intestate. It is very obvious, too, that the money arose from the money and other property given the widow by her father from time to time, during his life, and left her out of his estate at his decease, with the exception of such inconsiderable sums as the husband allowed her to take, as the result of her own earnings during the coverture, and incorporate with this separate estate of her own. We must then, we think, regard this fund as the separate property of the wife, chiefly arising from gifts and inheritance from her father, and all from that source and her own personal earnings during coverture, kept for her separate estate by the consent of her husband until his decease.

No question arises here in regard to creditors. How their interest might be affected by the husband allowing his wife, without the intervention of a trustee, to keep her own personal estate separate from his, and to do this through his agency and in his name during the coverture, it is not necessary to discuss here. It would seem from the case of *Porter v. the Bank of Rutland*, 19 Vt. 410, that creditors having knowledge of such estate being held by the husband, as the trustee in fact of his wife, although not in form a trust estate, will deprive them of all claim upon such estate, on account of the indebtedness of the husband. And it is there intimated that if this knowledge of the nature of the estate came to the creditor after the attachment, and before levy upon such estate, it will defeat the creditors' lien, or deprive him of the right to make the levy, which it is admitted he may

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de if ignorant of all trust for the wife. The same rule in regard to trust property, when the *cestui que trust* is not the wife of the trustee, was suggested if not adopted by this court, in a late case in Addison county. It involves probably no new principle in the law of trust; and all who are familiar with the subject are aware that creditors and purchasers are always bound to respect counter equities, in third parties, which come to their knowledge before they have actually made advances or otherwise changed their position, in faith of the absolute property being in the person ostensibly holding it.

But the present case goes entirely clear of all questions of this character. The question of priority of right here arises between the wife and the heirs of the husband. There can be then no question here, that according to the general policy of the law of courts of equity, the right of the wife is paramount to that of the husband, in all her personal estate, in whatever form, so long as the property is kept distinct from that of the husband, and he recognizes the separate property of the wife therein.

The principle is distinctly recognized in the case of *Porter v. The Bank of Rutland*, that the "husband is competent to act as the trustee of the wife's separate property, as well as any other person, if duly appointed;" and that he will be so regarded if he have in fact so conducted. It would seem that the present case comes very fully within the principle here laid down. This case is in fact a very much stronger case in favor of the wife's separate property than that of *Porter v. Bank of Rutland*, both in its general facts and the relation of the counter claimants. Here the appellants cannot, in any sense, claim to stand in any better light than the husband himself. So that their claim rests solely upon the fact of the husband having reduced the property to his own possession, as husband, and in his own personal right. And this fact, it seems to us, is distinctly and most unequivocally disproved by the entire testimony upon the point. There is not the shadow of ground for argument even, that the husband ever claimed to have taken possession of this property, in his own right as husband.

And the general principles of equity law seem most unequivocally to sustain the right of the wife to her separate property

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whether acquired before or during the coverture, and in the latter case, whether the acquisition is the result of gift or inheritance, or is the product of her own personal earnings. In every such case she will hold against the husband and his heirs, and generally against his creditors, so long as the husband allows the wife to keep the property separate from the general mass of his own estate, although his own name may be used in the formal conduct of the business, unless in the case of creditors this may lead to a false credit on the part of the husband. 2 *Story's Eq. Ju.*, sec. 1387; 2 *Roper Husband & Wife*, 171-176. The case of *Slanning v. Style*, 3 *P. Wms.*, 334, 337, is a strong case in point, in regard to the separate earnings of the wife during the coverture. And where the wife upon her marriage reserves the right to dispose of her personal estate, and a subsequent concession to that effect by the husband has been regarded as equivalent, it was held that all the personal estate of which the wife died possessed was to be taken to be her separate estate, or the produce of it. *Gore v. Knight*, 2 *Vt.* 535.

In Sir Paul Neal's case cited in *Herbert v. Herbert*, Prec. in Ch. 44, as early as 1692, it was decided that if a "woman has pin money, or a separate maintenance settled upon her, and she by management or good housewifery saves money out of it, she may dispose of such money, so saved by her, or of any jewels, &c., bought with it, by writing in nature of a will, if she die before her husband, and shall have it herself, if she survive him; and such money, jewels, &c., shall not be liable to the husband's debts."

So, too, if the wife, in the absence of the husband, carry on trade in milinery and support herself and children, the capital being furnished by her friends, although the business be carried on in the name of the husband, the avails will be regarded as the separate estate of the wife, and chancery will restrain the husband from interfering with it. *Cecil v. Juxon*, 1 *Atk.* 278. These principles have been followed and enforced by the courts of equity until the present day. And it may now be regarded, we think, as fully settled, that in a case like the present, if the husband, until his death, suffer the wife to maintain her separate estate, and so treat it himself, it must be so regarded after his death, and the personal representative is not called upon to take

Admr. of Pike v. Morey.

notice of it, in the settlement of the husband's estate. And if by accident the securities are mixed with those of the husband in the same general deposit, but in a separate parcel, whereby they are put into the inventory of the husband's estate, as in the present case, it is nevertheless the duty of the administrator to restore them, or the avails of them, to the wife. That is what we understand was done in the present case.

Judgment of county court reversed.

Judgment on the account, allowing both the \$800 and the \$1000, to the administrator with costs, ordered to be certified to probate court.

ADMINISTRATOR OF NEWHALL PIKE v. GEORGE A. MOREY.

Trover. Parol contract for sale of land.

A purchaser of land under a verbal contract, who has made a partial payment therefor under such contract, and has entered into possession by the consent of the vendor, has such an equitable interest in the land, that he may lawfully sever timber from the freehold or peel bark from the trees thereon; and such timber and bark, when so severed from the freehold, becomes in law the property of the purchaser, and is subject to attachment and execution at the suit of his creditors.

TROVER for a quantity of hemlock bark. Plea, the general issue and trial by jury, at the June Term, 1858,—BARRETT, J. presiding.

On trial the plaintiff offered to prove that in May, 1855, Benjamin Comings made a verbal contract with the defendant for the purchase of a wood lot in Fairlee, to the effect that Comings was to pay three hundred and fifty dollars therefor, fifty dollars to be paid upon the receipt of a deed of the lot from the defendant, and the balance of the purchase money to be specified in two equal notes signed by Comings and payable in one and two years

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respectively from the first day of the following April, which two notes were to be secured by a mortgage of the same land from Comings back to the defendant; that by the terms of said purchase the defendant was by a specified time to deposit with the town clerk of Fairlee a warrantee deed of the lot, which Comings would be entitled to receive in case he should, within a specified time, deposit with the town clerk for the defendant the fifty dollars, the two notes and the mortgage, above described; that immediately after this contract was made Comings took possession of the lot, cut timber, and peeled and piled thereon the bark in controversy, before the 23d of June, 1855, and with the defendant's knowledge and consent, having first, however, deposited with the town clerk fifty dollars and the notes and mortgage, in strict accordance with the terms of the verbal contract for the purchase of the lot above set forth, but that the defendant never deposited any deed of the lot with the town clerk, nor gave any notice to Comings of any intention on his part to rescind this contract; that on the 20th of November, 1855, the plaintiff's intestate caused the bark in controversy, then lying on the lot in question, to be attached in a suit in his favor against Comings, and subsequently purchased the same at sheriff's sale on an execution duly issued upon a judgment duly rendered in his favor against Comings in that suit; that after this execution sale to the plaintiff's intestate, the defendant entered upon the lot and took and carried away the bark.

The county court excluded this evidence, and, none other being offered by the plaintiff, directed a verdict for the defendant, to which the plaintiff excepted.

Chas. C. Dewey, for the plaintiff.

Ormsby & Farnham, for the defendant.

BENNETT, J. The plaintiff, as the administrator of Pike, claims title to the bark in question under a levy and sale on execution against Benjamin Comings; and the question is, did the bark belong to the defendant, or was it the property of Benjamin Comings?

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It seems the defendant was the owner of a lot of land, and that he sold it to Comings by a verbal contract, and that Comings advanced for the use of the defendant a part of the purchase money, and went into possession under an express agreement of the parties, and while in such possession, under the contract of purchase and by the consent of the defendant, he cut, peeled and piled up the bark in question upon the land he had purchased; and the question is, was the bark his, or was it the defendant's?

A parol contract for the sale of lands is not *void* by the statute, but the statute simply declares that no action shall be maintained on such a contract.

But if it has been in part executed, in equity it is taken out of the statute, and its performance may be enforced in a court of equity.

In this case, Comings, having gone into possession under his contract, and having deposited the fifty dollars with the town clerk, and also his notes and mortgage to secure the balance of the purchase money, according to the terms of the agreement, had the right to compel a conveyance from the defendant in a court of equity.

When Comings cut down the trees and peeled the bark he was the equitable owner of the land, and cut the timber in his own right, and was guilty of no trespass against the defendant.

When the bark was severed from the freehold it became personality, and it being rightfully severed the legal title to the bark would vest in Comings, although he was only seized of the fee of the lands in equity; *Yale v. Seely* 12 Vt. 221.

No question is raised in argument but what the attachment and sale of the bark under the execution against Comings was regular, so as to vest the property in Pike, the intestate; provided Comings was the owner of it at the time of the attachment and sale, and we are not aware that any could be raised.

Judgment reversed, and cause remanded.

Underhill v. Welton.

HANNAH UNDERHILL v. GEORGE W. WELTON.

Slander.

Words charging an unmarried woman with unchaste conduct are not actionable *per se*, unless the charge is one of sexual intercourse with a married man, or of such conduct as amounts to open and gross lewdness.

Words, charging an unmarried woman with being a whore, are actionable if any pecuniary damage is alleged and proved to have resulted therefrom. In this case, it was held sufficient to allege and prove that in consequence of grief occasioned by the speaking of such words, the plaintiff either suffered *loss of time*, or was prevented from pursuing her usual avocations with the strength and health she otherwise would have enjoyed.

CASE for slander. The first count in the declaration alleged that the defendant falsely and slanderously said that the plaintiff was a whore, and set forth as damages that by reason of such slander the plaintiff had "been injured in credit, suffered loss of character, loss of hospitality among friends, loss of peace of mind and health, and had been subjected to great distress in feeling, *loss of time*, and had been otherwise greatly injured." The second count alleged the utterance of substantially the same slanderous words, and set forth, among other damages not of a pecuniary character, that in consequence of such slander "the plaintiff was greatly injured and enfeebled in both body and mind, and was caused much anxiety, trouble and dejection of spirits, insomuch that she was deprived of much sound sleep and repose, and was greatly grieved, and *was also prevented and disabled from pursuing and following her accustomed duties and labors with the strength and health that she otherwise would have enjoyed.*"

The defendant pleaded the general issue, and the cause was tried by jury, at the June Term, 1858,—BARRETT, J., presiding.

On trial, the plaintiff, who was an unmarried woman, after giving evidence tending to prove the speaking, by the defendant, of the words charged in the declaration, gave evidence tending to prove that the plaintiff, in consequence of the speaking of these words by the defendant, was greatly troubled in mind, and became very nervous, and did not appear well, nor look well, and sometimes waked up in the night and shed tears, and that this rendered her less capable of attending to her ordinary household

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affairs than she otherwise would have been; that in fact she was occasioned much loss of time; that her general ability to labor was not only impaired, but also that there were times when she had crying spells, which, while they lasted, interrupted her ordinary business; and that these crying spells were occasioned by the speaking of said words by the defendant.

The testimony on the part of the defendant tended to prove that this was mainly occasioned by the pendency of this suit, which she had caused to be commenced, and that, notwithstanding this, she continued able to do, and in fact did do her household work, as she had been accustomed to do.

There was no testimony given tending to prove any other special damage sustained by the plaintiff in consequence of the speaking of the words charged.

The court charged the jury that the words alleged in the declaration were only actionable by reason of some special pecuniary damage therefrom resulting, and accruing before the commencement of this suit; and that if they found that the words were spoken as alleged, and that by reason of the grief and anxiety occasioned by learning that they had been spoken by the defendant, the effect upon the mind or body of the plaintiff was such as to render her less capable of attending to her daily business, she had proved a cause of action which would entitle her to a verdict.

To this charge the defendant excepted, and the jury returned a verdict for the plaintiff.

After verdict the defendant moved that judgment be arrested for the insufficiency of the declaration; which motion was overruled by the court; to which decision the defendant also excepted.

P. T. Washburn, for the defendant.

Ormsby & Farnham, for the plaintiff.

POLAND, J. Words imputing unchaste conduct to an unmarried woman are not in this State actionable *per se*, because such conduct does not subject her to any criminal punishment. A charge of sexual connection with a married man, or a charge of unchaste conduct of a character that would amount to *open and gross lewdness*, would be actionable for the reason that either

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would subject her to corporal punishment for a crime involving moral turpitude.

In all those States where it has been held actionable to charge a single woman with a want of chastity, they have statutes against fornication, and these decisions have gone upon the ground that such charge, if true, rendered her liable to punishment under such statutes.

As we have no such statute, such actions cannot be here sustained except by alleging and proving that the plaintiff had sustained some *special* and *pecuniary* loss or damage, from the speaking of the words by the defendant.

The defendant in the present case claims that the plaintiff's declaration contains no such allegation of special damage as would authorize a recovery, and that no sufficient special damage was proved at the trial. The questions as to the sufficiency of the declaration, and the correctness of the charge to the jury, are substantially the same.

The plaintiff's first count alleges as among the consequences of the speaking of the words set out in the declaration, that "she was subjected to great distress in feeling, *loss of time*, and otherwise greatly injured."

The second count, among other allegations of damages, says that thereby "the plaintiff was also prevented and disabled from pursuing and following her accustomed duties and labors with the strength and health that she otherwise would have enjoyed."

The proof seems to have at least fully sustained all that either count alleges as to damages resulting from loss of time and inability by the plaintiff to perform her ordinary domestic and household duties. We are of opinion that either of the counts sufficiently alleges a pecuniary damage resulting from the words spoken by the defendant to sustain the action.

The allegation of *loss of time* in the first count, has always been regarded as a good allegation of pecuniary loss, and that it is stated in a very general manner is not a sufficient objection after verdict. In *Bradt v. Towsley*, 13 Wend. 253, which was a similar action to this, the allegation of damage was that the plaintiff "had been hindered and prevented from attending to her necessary affairs and business."

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The allegation of damage in the plaintiff's second count is very similar. Instead of alleging a total inability to perform her ordinary labor and duties, it alleges a partial inability, that she was *less able* to perform them. We think the legal character and effect is the same. This case in Wendell is cited and approved in the subsequent case of *Beach v. Ranney*, 2 Hill 312, and we think is a sound and sensible decision. The last case which is cited and relied on by the defendant goes entirely on other grounds; that some of the damages alleged were not *pecuniary*; that others were not the direct result of the words, but the wrongful acts of third persons; and that the action for the recovery of such special and pecuniary damages must be brought by the husband alone, and not by husband and wife. All authorities agree that any pecuniary damage, however slight, is sufficient to sustain the action.

The judgment of the county court is affirmed.

THE CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD COMPANY
v. BUCKLEY HOLTON.

Respective rights of railway companies and former land owners to the land taken by the former for railroad purposes. Railway farm crossings. Trespass.

One, whose land has been taken, appraised and paid for by a railroad company, under their charter, for railroad purposes, has no right to enter upon or use such land for any purpose which in the least degree endangers or embarrasses its use, by the company, for any of the objects which the railway is intended to accomplish; as in this case, for instance, to enter upon the land with teams to remove turf therefrom, the effect of such entry and removal being to enhance the danger of cattle getting upon the track, and to increase the dust at the time of the passage of the cars.

Under sec. 43, chap. 26, p. 200, Comp. Stat., in regard to railway farm crossings, neither the railway company nor the adjacent land owner have the right to determine separately, and without the consent of the other party, the number, character and location of the farm crossings.

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The proviso to sec. 14, of the charter of the Conn. and Pass. R. R. Co.,* gave the land owner no right to cross the track which could not be controlled and regulated by subsequent general legislation, and sec. 43 of chap. 26 of the Compiled Statutes had the effect to regulate and define the right of crossing conferred by that proviso.

The owner of land adjoining a railroad track has no right to build a farm crossing at any other point than the one fixed by the commissioners, or agreed upon with the railroad company, nor to cross the track at any other point than the established crossing.

A railway company may maintain trespass for all unlawful entries and acts upon the land taken by them for railroad purposes under their charter, whenever such entries and acts interfere with the exclusive possession of such land which the company is entitled to.

TRESPASS quare clausum fregit. The case was referred and the referee reported the following facts :

At the time the plaintiffs' railroad was constructed, a portion of their road bed and the land adjoining on each side was taken by them from the defendant, and the damages for such taking were duly appraised and paid according to the provisions of the plaintiffs' charter. After this land, so taken and paid for, had been enclosed by the plaintiffs, and while it was in their possession, the defendant, at different times, entered thereon with his servants, oxen and cart, through the fences enclosing it, and cut and carried away the turf from a portion of it lying between the railroad track and the fence. This portion was about two rods wide and fifty rods long. This entry and removal of the turf was committed under a claim of right by the defendant, who owned the land adjoining the enclosure, but it was against the will and protest of the plaintiffs.

The referee also found that such entries by the defendant on this land enhanced the danger of accident to the passengers and employees on the plaintiffs' road, on account of the liability of the oxen from fright or otherwise to run upon the railroad track, and he also found that the removal of the turf increased the dust about the cars and engines when in motion, thereby annoying the passengers and to some extent injuring the machinery of the locomotives ; but that if the defendant had the right to enter the

* This proviso is recited in the brief of the defendant's counsel.

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enclosure with his team and remove the turf, he had done so in a safe and prudent manner.

The referee also reported that the defendant, without the consent and against the wishes of the plaintiffs, had taken down one length of the plaintiffs' fence on each side of the railroad track on his farm, and made a "crossing" about twenty rods south of the "crossing" made by the plaintiffs for the accommodation of the defendant. The defendant did this for his own convenience, to enable him to draw manure and produce across the track, which could be done more conveniently at the new than the old "crossing." In making this "crossing" the defendant filled the ditch on the side of the track, which had a tendency to dam up the water and saturate the embankment on which the track was laid. He also laid loose planks between the rails, which rendered the passage of the engine and cars less safe than if the planks were fastened, and the referee also found that the crossing of the track at this place with teams, and the removal of the fence enhanced the danger of accident on the railroad.

The referee further reported that if the defendant was a trespasser in the acts above detailed, the plaintiffs were entitled to recover for building the new crossing, taking down the fence at that place, and crossing the track with teams, the sum of ten dollars, and for entering the land adjoining the track at the other place and removing the turf therefrom, the sum of thirty-five dollars.

The county court held that the acts of the defendant, complained of and reported by the referee, were trespasses, and rendered judgment for the plaintiffs upon the report for nominal damages and costs, the plaintiffs having waived their claim for the actual damages reported by the referee.

To this judgment of the county court the defendant excepted.

Ormsby & Farnham, for the defendant.

1. The action is wrongly brought. The plaintiffs' right to the land consisted only of an easement, and even if the defendant's acts tended to interfere with their enjoyment of that easement, the action should have been case, and not trespass.

2. The acts of the defendant in regard to the new crossing

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give no ground of action. The original charter of the plaintiffs expressly provides that land owners shall have the right of crossing. The provision to section 14 says "*nothing in this act shall be construed to prevent the crossing of said road or way, with teams, or otherwise, in such a manner as shall be calculated not to injure the same.*" As this is a charter provision, subject to which the land of the defendant was condemned to the plaintiffs, it cannot be controlled by subsequently passed general statutes. The general statutes (1849) afterwards passed, requiring railway companies to provide crossings, cattle guards, etc., if obligatory on the companies, are, as to the rights of the land owners, cumulative. Such enactments cannot, without their consent, modify in the least the rights of the former. But these statutes expressly provide for the preservation of all rights previously accrued under charters.

A. Howard, Jr., for the plaintiffs.

The land which is taken under the right of *eminent domain* which exists in this State, for the use of a railroad, becomes so far the property of the railroad corporation that their right is exclusive in its use and possession, and those from whom the land is taken retain no right to its use or occupation; *Hurd v. R. & B. R. R. Co.*, 25 Vt. 116; *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150; *Redfield on Railways*, p. 127, sec. 11, and note 15.

ALDIS J. The action is trespass, *qu. cls. fr.*

It appears that the land upon which the alleged trespass was committed was originally a part of the farm owned by the defendant, and that it was taken by the plaintiffs, under their charter, and the damages duly appraised and paid.

The defendant, being the adjoining land owner, claims the right to enter with his servants, oxen and cart, through the plaintiffs' fence upon the strip of land lying between the fence and the railroad track, and to cut and carry away the turf.

He also claims the right to take up a length of fence on each side of the road on his farm, and to make a farm crossing for his own convenience, without the consent of the plaintiffs or the authority of the commissioners, at a place distant and different

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from the crossing made by the plaintiffs, and to use the farm crossing, so by him made, for the convenience of the work on his farm.

Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety, require that their possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used.

The possession of the railroad company cannot be limited to any point of occupation less absolute and exclusive than this: that the corporation may do any act upon the land conducive to those public uses for which their charter was granted, and may exclude the land owner from taking any possession or doing any act upon the land which may in the least degree tend to jeopardize the safe transportation of passengers and freight upon the road, or which may in any way interfere with or embarrass their use of the road and land for any of the purposes which the railway is intended to accomplish. This possession in Massachusetts has been said to be "practically exclusive;" 2 Gray 574. In *Jackson v. The R. & B. R. R. Co.*, 25 Vt. 159, though the precise point was not under consideration, Ch. J. REDFIELD says "the R. R. Co. must have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose." Without stopping to inquire whether a possible case may not exist where the land owner might enter to obtain mines or minerals, or to take herbage or other vegetable growth, it is obvious that the possession of the railroad company must ordinarily and practically be absolute and exclusive. Hence any entry by the land owner or any act done by him upon the land which tends in the least to impair the structure of the road, to endanger the running of trains, to lessen the safety or comfort of passengers, or generally to embarrass the use of the road for the purposes for which it was built, or the power of the railroad company to keep it in repair, must be deemed wrongful.

I. The removal of turf from the sides of the road and the

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adjacent strips of land is clearly an unlawful act on the part of the land owner. Where the road bed and adjacent soil are bare, dust is increased by the motion of the engines and cars as they pass along. This becomes a great annoyance to passengers at certain seasons of the year, and especially in the dry, hot weather of summer. To prevent or remedy this evil the railroad companies are sometimes obliged to incur expense. To some extent, doubtless, the dust is injurious to the machinery of the engines. The railroad companies have the right to preserve and promote, as far as practicable, a growth of turf along their road bed and its sides, and upon the adjacent strips of land; and an entry by the adjoining land owner to cut and carry away the turf must be held to be a trespass.

The referee, in estimating the damages, allowed the plaintiffs to recover for the value of the turf so removed. But as the plaintiffs have remitted the damages and claim only nominal damages, we need not inquire as to the respective rights of property which the land owner and the company may have in the soil and herbage of land taken by the plaintiffs under their charter.

II. The 43d section of the 26th chapter of the Compiled Statutes provides that if the parties cannot agree upon the plan, manner or number of farm crossings, the same shall be determined by commissioners. This, by implication, clearly precludes both the railroad companies and the land owners from determining separately and without the consent of each other, where and what and how many the farm crossings shall be. They must agree or submit the question to the decision of commissioners. From the operation of this general law the defendant claims to be exempt by virtue of the language employed in the plaintiffs' charter, which it is claimed secures to him a right independent of all subsequent legislation, to build and use farm crossings as in his own judgment he may think his convenience requires. The right, as expressed in the charter, to cross the railroad with teams or otherwise, is to be used "in such a manner as shall be calculated not to injure the same." We think the right is to be used not merely so that the track or road bed should not be injured, but that a larger meaning, a more liberal construction, should be put upon this language, viz: that the right to cross the railroad should be

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used so as not to injure the proper and reasonable enjoyment of the road by the corporation. It is obvious that the manner in which such a right should be exercised must be settled by the agreement of both parties, or else be regulated by law. Hence the subject necessarily becomes a fit subject of legislation, and neither party can claim any vested rights in the matter beyond the control of legislation. The general law on this subject was required, both to settle the conflicting claims between land owners and the railroad companies, and to secure more fully the safety of the public in traveling upon railroads. If every land owner could build and use farm crossings wherever he pleased and as many as he pleased, the dangers of railroad travel would be alarmingly increased. The question of convenience or inconvenience to the land owner in using his farm crossings, sinks into insignificance when compared with the question of safety or danger to all who travel on railroads.

The land owner has no right to build a farm crossing at any other point than the one fixed by commissioners, or agreed upon with the company. He has no right to cross the track at any other point than the established crossing.

In this case many of the acts done by the defendant, and necessarily done in order to exercise what he deemed his rights, added materially to the risks and perils attendant upon the use of the road. He filled the ditch along the sides of the road bed, thus damming the water and saturating the embankment upon which the track is laid, and impairing the solidity and permanency of the road bed. Here the injury may have been inconsiderable; at other places, in other soils and at certain seasons of the year, as in the spring and fall, it might produce serious mischief.

He laid planks between the rails without fastening; he entered upon the strip of land at the side of the track with oxen; he crossed the track with his teams at other places than the regular farm crossing; he removed a length of the fence on each side of the track. Each and all these acts made it less safe for the plaintiffs to run their trains upon the road. They endangered the safety of the traveling public. No land owner can hold any such rights. The very purpose for which his land was taken and his

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damages appraised, was to establish a railroad for the *safe* transportation of passengers and freight; and he has no right reserved in the land, the exercise of which may in the most remote manner make such transportation unsafe. His convenience must yield to the public welfare.

We consider all these acts which the defendant has done under a claim of right to be wrongful. They endanger the safety of all who travel, and in deciding upon the questions here involved, the public safety is the paramount consideration.

For these injuries to the plaintiffs' rights and possession, trespass is the proper remedy.

The judgment of the county court is affirmed.

THE STATE OF VERMONT v. THE VILLAGE OF BRADFORD AND OTHERS.

Quo Warranto. Corporations. Costs.

An act of the Legislature incorporating the village of Bradford provided that a meeting of the legal voters of such village should be held, and that if a majority of the legal voters present should vote in favor of accepting the charter, it should be in force, but otherwise void. The meeting was held, and the majority of the votes cast were in favor of accepting the charter, and officers were elected as provided thereby, and the village was organized as a corporation. Upon a motion by the State's Attorney for leave to file an information in the nature of a *quo warranto* against such corporation and its officers, setting forth that a portion of the vote at such meeting was fraudulent, and that in fact a majority of the legal voters present voted against the acceptance of the charter, and upon testimony showing the truth of the allegations in the information, the supreme court allowed the information to be filed, and ordered that the corporation be dissolved, and that the other defendants should no longer exercise any of the functions pertaining to the offices thereof.

But the officers of the corporation having filed a disclaimer of any purpose of exercising the functions of the offices to which they had been elected, no costs were allowed against them, on the ground that there was no distinct evidence of their participation in any illegal or improper proceedings in effecting the organization under the charter.

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Though proceedings of *quo warranto* against a corporation, and its officers, are brought in the name of the State, yet the name of the relator, if there be one, should be brought upon the record, and when the defendants prevail, they may be allowed costs against the relator. REDFIELD, CH. J.

This was a motion by the State's attorney for Orange County, for leave to file an information, praying for a writ of *quo warranto* against the defendants, the corporation of the village of Bradford, and sundry individuals who claimed to act as officers of such corporation.

The information alleged in substance that the Legislature of this State, in 1858, granted a charter to the citizens of the village of Bradford,* by which it was provided that a meeting of the legal voters of that village be held on the first Wednesday of January, 1859, to see if they would accept and approve such charter, and that if a majority of the legal voters present at such meeting should be in favor of such acceptance and approval, then the charter should be in force, but otherwise void; that such a meeting was held at the appointed time, that only ninety-five legal voters were present and voted at the meeting, but that one hundred and twenty-two votes were actually cast, of which fifty-one were cast against the acceptance and approval of the charter, and seventy-one in favor thereof, and that the vote was so declared; that eighteen of the ballots cast in favor of the acceptance of the charter were surreptitiously and illegally placed in the ballot box, and that in addition thereto, nine persons, who actually voted in favor of such acceptance, and whose votes were counted, were not by the terms of the charter legal voters at such meeting, and therefore, that, in fact, of the legal voters of the village, present at the meeting, fifty-one voted against the acceptance of the charter, and only forty-four in favor of it, and that the act of incorporation thereby became void; that the meeting then proceeded to organize the corporation of the village of Bradford in pursuance of the provisions of the act, and that it appeared by the records of such proceedings that the village of Bradford was a corporation, and claimed and was exercising corporate powers; that at such meeting several persons, being all the defendants except the corporation itself, were chosen by a small minority of

* See Acts of 1858, p. 111.

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the legal voters present, officers of such corporation, (naming them respectively,) and that they had severally accepted the offices to which they were chosen, and had entered upon the duties thereof, and still claimed to hold said offices respectively, and to exercise the duties thereof under and by virtue of the provisions of the charter, though notified of the frauds perpetrated at the meeting as above mentioned.

The State's attorney also prayed for a summons against the defendants to appear before the court to show cause why the information should not be filed, and that the court would make such order as to the taking of testimony as they should deem proper.

The court issued a summons according to the prayer of the State's attorney, and ordered that the testimony should be taken in the form of affidavits upon notice to the adverse parties.

Testimony was taken by the prosecution in the manner prescribed, which it is not necessary to repeat, as it tended to sustain the allegations of the information, and as no testimony was taken on behalf of the defendants. The defendants, who were alleged to be acting as officers of the usurping corporation, filed an affidavit disclaiming any purpose of exercising the functions of the offices to which they had been elected.

Charles C. Dewey, State's Attorney, with whom was *R. McK. Ormsbee*, for the prosecution, cited *Rex v. Latham*, 3 Burr. 1486; 1 W. Black 468; Tancered on *Quo Warranto* 85; Willcock on Corporations 478; *Rex. v. Corp. of Camarthen*, 2 Burr. 869; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230; *State v. Boston, Concord & Montreal R. R. Co.*, 25 Vt. 441; Redfield on Railways, chap. 27, p. 472; *King v. Tate*, 4 East. 237; *Rex. v. Powell*, Sayer 239; *Regina v. Blagden*, 10 Mod. 298.

REDFIELD, CH. J. This is a motion and summons against the defendants, wherein the State's attorney, as the representative of the sovereignty of the State, asks leave to file an information against the nominal and *de facto* corporation of the village of Bradford, for having usurped the prerogatives and franchises of a municipal corporation within the State, without the grant or

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permission of the State; and against the other defendants for having unlawfully and without proper warrant, presumed to hold and exercise the offices of such usurping corporation.

The corporation make no answer or defence in form, except to put the prosecutor upon proof of the allegations contained in his information. We are satisfied from the evidence in the case, that there could not have been a legal majority of the voters present at the meeting in favor of accepting the charter, and that it did not therefore become a binding law. The organization therefore under it is a mere usurpation of corporate franchises, without any legal warrant.

In such cases the law is well settled, in England, that upon the information of the attorney general the court of King's Bench will abate and dissolve the corporation, whether it be a private or public one. When the corporation is of a public character, like a town, or village, which constitute integral portions of the sovereignty itself, there is more propriety in visiting the usurpation of these important functions of sovereignty, with this formal denial of their right to exercise such usurpation, than in the case of a mere private corporation, but the law seems to be the same in either case.

It is only the sovereign power of the State which can create corporate franchises, and all who presume to exercise them without the consent of such authority are liable to this mode of procedure.

We think there can be no question that the corporation *de facto* should be dissolved.

And in regard to the other defendants it seems that they now disclaim any purpose of exercising the functions of the offices to which they were elected, and of which election a formal record was made, and which has been certified in this case by one of the defendants, as secretary of the usurping corporation. All that is requisite in regard to them will be effected by a judgment against the corporation, perhaps, but we see no reason why a judgment of ouster should not be formally entered against them. If the title to a corporate office is only defective from an irregular swearing in, the judgment against the party is only for a fine for the temporary usurpation, and that he do not further exercise

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the office until sworn. *Rex v. Clark*, 2 East. 75; 9 East. 246 *et seq.* Judgment of seizure of the franchises to the use of the King may be given against a corporation upon a disclaimer, and this will preclude the party from afterwards setting up the same title. S. C. and *Rex v. Ware*, 3 B. and A. 590; *Rex v. Chester*, 2 Shower 365; on a *nil dicit* to a *quo warranto* information, the judgment is *quod capiatur*; *Rex v. Tyrrell*, 11 Mod. 285. Where the franchises are usurped the judgment is *quod extinguantur*. Smith's case, 4 Mod. 54, 56. Judgment was given in *quo warranto* against the city of London, that the liberties thereof being seized into the King's hands did not dissolve the corporation or remove the officers from their corporate offices. But where the corporation is intended to be dissolved, judgment to that effect should be formally entered. *Sir James Smith's Case*, 4 Mod. 52; 14 Petersdorff 111 N.

In regard to costs it is not customary in the English courts to award them against an officer in a municipal corporation, where one is compellable to accept upon peril of indictment or penalty; and from which no emoluments are ordinarily expected to arise. *The King, at the relation of R. King v. Wallis*, 5 Term. R. 375. But where there has been misconduct, either in the usurpation or unreasonable persistence in holding on upon the office, it may be proper to award costs. And by the statute of 9 Ann. c. 20, sec. 5, it is provided that the courts may in such case award both fine and costs against the defendant; and that the defendant shall recover costs against the relator, whenever he prevails in the trial.

In the case of *State v. Boston, Concord & Montreal R. R. Co.*, 25 Vt. 445, it is said "and as the proceedings have been in the name of the State, no costs can be awarded." But upon further examination I am satisfied costs are awarded, in the English practice, in such cases, against the relator, whose name is there always brought upon the record, and should be here probably. The subject of costs in such proceedings is very elaborately discussed by *Buller J.* in *Rex v. Wallis*, 5 T. R. 375.

Judgment that the State's attorney be allowed to file his information; and therefore the court do adjudge that the facts therein set forth are true, and that the said pretended corporation of the

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village of Bradford be, and the same hereby is, dissolved, and that the other defendants no longer exercise any of the functions pertaining to said offices, but that no costs be taxed against any of the defendants.

The reason we do not allow costs in this case is that there is no distinct evidence that these defendants have participated in any illegal or improper proceedings, in effecting the organization under the charter.

JESSE DICKEY v. HARRIET ANDROS.*Slander. Variance.*

In an action for slander, if the declaration allege that the defendant charged the plaintiff with a crime, and the proof disclose merely that he said he supposed the plaintiff to be guilty of such crime, the variance is fatal.

But the latter expression would be actionable. REDFIELD, Ch. J.

But it is not actionable to express a supposition or belief that one went to a place for the purpose of persuading another to commit adultery with him.

SLANDER. The declaration charged the defendant with having used, at the house of one Mary Webster, and concerning a pretended sexual intercourse between the plaintiff and said Mary, the following words, viz:

"I saw Dickey (meaning the plaintiff) here (meaning where the defendant then was) on Friday night, (meaning Friday, the 30th of May, 1856.) I saw him and heard him and can swear to it, and can prove it. He (meaning the plaintiff) was not here for any good design, (meaning that the plaintiff was with said Mary for purposes of adultery.) I will break up the haunt if I can possibly do it, (meaning that the defendant was scandalized to have such operations so near her; that the plaintiff came to said Mary's house, and was so accustomed to do, and commit the crime of adultery, and that the defendant was resolved to break up such unlawful operations.)

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Plea, the general issue, with notice of special matter in defence by way of justification, and trial by jury, at the June Term, 1858,—BARRETT, J., presiding.

On trial the plaintiff proved that the defendant said that the plaintiff was at Mrs. Webster's on the occasion named, and added, "I saw him and heard him and can swear to it, and furthermore can prove it, if called on;" and that the defendant, on being asked for what purpose she supposed the plaintiff went there, replied, "I suppose he came there not out of any good design; I mean to break up the haunt if I can."

Upon this evidence the county court directed a verdict for the defendant, to which the plaintiff excepted.

Ormsby & Farnham, for the plaintiff.

A. M. Dickey and *C. W. Clark*, for the defendant.

REDFIELD, Ch. J. The declaration in the present case is for slander in charging the plaintiff with the crime of adultery, committed with Mary Webster. The words alleged are equivocal, not necessarily, or naturally perhaps, implying such an offence. But it is competent by means of prefatory averments, and innuendoes referring to such prefatory averments or colloquiums, to give the words spoken a more extended import than they would otherwise bear. But the truth of the colloquium and of the innuendoes is to be inquired of and determined by the jury. And if the testimony given by the plaintiff in support of his declaration has no tendency to show the speaking substantially the same words, and in the sense alleged, the county court may direct a verdict for the defendant. The inquiry in this case is, whether the evidence given by the plaintiff had any such tendency?

The words spoken were not the same, but are very similar, substantially the same, except that in the declaration it is alleged the defendant said "he was not here for any good design;" the innuendo being that the plaintiff was with said Mary for purposes of adultery. These words then are treated by the pleader as containing a distinct charge of the crime of adultery. The proof is that the defendant said "she supposed he came there not out

Dickey v. Andros.

of any good design." It would seem questionable whether the form of expression used is equivalent to a direct charge of the fact. To say "I believe, or I suppose one guilty of an infamous crime" is certainly actionable, very much the same as saying he is guilty. For in the latter case it is received as my opinion merely, most commonly. From saying that a fact exists it is not always to be inferred that the speaker has positive knowledge of the fact. It ordinarily imports no more than that the speaker supposes it to be true, or believes it upon such evidence as is satisfactory to him. But the case of *Tozer v. Mashford*, 6 Exch. 539, holds that it is not slanderous to indicate a suspicion that one is guilty of an infamous crime. If the case were to turn wholly upon this point, I should desire to examine further before holding that the variance between the proof and the declaration is fatal to the action. But from the best examination I have been able to make, it would seem that although both forms of expression may be actionable, they are not identical, or of the same legal import. There is then a technical variance between the declaration and the proof. The court regard the variance as fatal.

But upon the question whether the evidence tended to prove the words spoken in such a sense as to impute to the plaintiff the actual commission of the crime of adultery, we are satisfied it does not. For if we suppose the defendant intended to insinuate that the plaintiff was at Mrs. Webster's for the purpose and with the intent to induce her to commit the offence, which is probable enough, it would seem that the witness did not understand the defendant to charge that the plaintiff succeeded in such purpose, but on the contrary, explicitly declares that the defendant did not so state. It was at most then, a charge that she supposed or suspected the plaintiff was there to seduce or persuade Mary Webster to the commission of the crime with himself, which is not indictable, unless something more is shown than is here charged. We think, therefore, the testimony did not tend to prove the colloquium and innuendoes in the declaration, and that the county court should have directed a verdict for the defendant.

Judgment affirmed.

Eaton et al v. Cook.

EATON, LOVETT & WELLINGTON v. THEODORE COOK.

Stoppage in transitu.

When goods are purchased and paid for by the order, note, or accepted bill of a third party, without the indorsement or guaranty of the purchaser, the vendor has no right of stoppage *in transitu*.

When goods are sold to one person, who, before delivery to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor will have no right of stoppage *in transitu*.

TROVER for a lot of hardware goods. Plea the general issue and trial by jury, at the June term, 1858, BARRETT, J., presiding. On trial the following facts appeared :

Barnes & Brothers were manufacturers of shoe thread, &c. in Corinth, Vt. They had been accustomed for a considerable time to sell their manufactures to the plaintiffs, who were hardware dealers in Boston, sometimes receiving payment in cash, and sometimes by drawing orders payable in hardware on the plaintiffs in favor of country merchants with whom Barnes & Brothers were dealing. Barnes & Brothers, being indebted to the defendant, December 7th, 1857, drew the following order upon the plaintiffs :

MESSRS. EATON, LOVETT & WELLINGTON,

Please let Mr. Theo. Cook have what goods he may want, and we will pay you in thread and cord.

BARNES & BROTHERS.

Corinth, Dec. 7th, 1857.

The defendant presented this order on the 8th of December, 1857, to the plaintiffs, who accepted it and made up for the defendant the bill of goods sued for, giving to him a bill of the goods as bought by him, and receipted as being paid by the order of Barnes & Brothers, and thereupon the defendant indorsed on the order the receipt of that amount of goods, the plaintiffs charging the goods to Barnes & Brothers. The defendant returned home, and the plaintiffs, pursuant to his directions, did up the goods in packages, directed to *Theodore Cook*, Bradford Depot, Vt., and delivered them at the railroad depot in Boston, to be forwarded for and at the charge of the defendant, to Bradford depot, that being the station nearest the place of business of said Cook.

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The goods were forwarded by railroad from Boston on their way to Bradford. Before they arrived at Bradford the plaintiffs learned that Barnes & Brothers had failed and become insolvent after the sale of these goods, and they immediately telegraphed to one Classon, depot master at Thetford, to stop and take possession of the goods, when they should arrive at that place en route for Bradford, as the agent and in behalf of the plaintiffs. Classon, when the goods arrived, announced to the conductor of the train having charge of the goods, the instructions he had received, and then claimed to take possession of the goods for the plaintiffs, and required that they should be taken off and left at Thetford. The conductor refused to deliver the goods till they had arrived at their destination; whereupon Classon got into the car in which the goods were and went with them to Bradford depot, where they were unloaded. He then told Andrus, the depot master at Bradford, of his agency and business for the plaintiffs, and put the goods into his hands to be held by him for, on account of, and subject to the order of the plaintiffs. Andrus received and held the goods accordingly. The day after the goods thus arrived at Bradford, Wellington, one of the plaintiffs, and also the defendant, went to Bradford depot. Wellington claimed and demanded the goods of Andrus, and offered to pay the freight on them. The defendant also claimed and demanded the goods of Andrus, and offered him a bond of indemnity, which he received, and thereupon delivered them to the defendant. Wellington insisted on the plaintiffs' claim and right to the goods, and forbid Andrus to deliver them to the defendant. Upon these facts the court directed a verdict for the defendant, to which the plaintiffs excepted.

Ormsbee & Farnham, for the plaintiffs, cited *Dixon v. Yates*, 5 Barn. & Ald. 313; *Small v. Moote*, 9 Bing. 574; 1 Smith's Lead. Cases, 433; *Redfield on Railways*, 303, sec. 2; 3 East. 396; 7 D. & E. 442; 7 Mass. 757; 12 Pick. 308; *Coats v. Railton*, 6 B. & C. 422.

P. T. Washburn and *A. M. Dickey*, for the defendant, cited 1 Parsons Cont. 476; 2 Kent 245; *Sawyer v. Joslyn*, 20 Vt. 172; *Stubbs v. Lund*, 7 Mass. 457; *Rowley v. Bigelow*, 12 Pick. 314;

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Smith's Mer. Law 653 ; *Stoveld v. Hughes*, 14 East 808 ; *Hawes v. Watson*, 2 B. & C. 540.

REDFIELD, CH. J. I. The parties treated the transaction, in this case, as a sale directly from the plaintiffs to the defendant. The goods were so billed. If that is the proper view of the case, there was no credit, and of course no right to stop *in transitu*. For that right is made dependent upon the sale being upon credit. So far as the defendant is concerned, the case is the same as if the goods had been bought upon the sale of the note, or accepted bill of Barnes & Brothers, without any indorsement or guaranty by the defendant, or an indorsement without recourse. In that view there could be no pretence of any right to stop the goods *in transitu*.

II. And as a sale to Barnes & Brothers, and a resale by them, there seems to arise a difficulty in presuming any right of stoppage *in transitu*. For if the vendor consent to a resale or know the purchase is for that purpose, he is bound by the commencement of the new destination as a final and irrevocable delivery. The same as when the goods are sent abroad, upon an adventure. *Stubbs v. Lund*, 7 Mass. 453, and cases cited. *Stoveld v. Hughes*, 14 East. 808, was a case where the goods were resold and marked by the second vendee, by the consent of the vendor, which is not stronger than the present case, viewed as a resale. For here the goods were purchased for the express purpose of resale to the defendant, and were delivered to the carrier not to be carried to Barnes & Brothers, or with any provision for any transit to them. This delivery then was final, and accomplished all the possession ever contemplated by Barnes & Brothers.

III. And if we attempt to make it a sale to Barnes & Brothers, and to find a journey or transit, there was in fact nothing of the kind contemplated, so far as the vendees were concerned. And the cases all require that fact to exist, in order to create the right to stop *in transitu*. Upon the delivery to the carrier it had effectually come to the possession of Barnes & Brothers as much as it ever was contemplated that it would come. This is expressly recognized in numerous cases. *Rowley v. Bigelow*, 12 Pick. 214 ; *Noble v. Adams*, 7 Taunton 59.

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There is no doubt if the vendee make a resale of the goods, he makes it subject to the vendor's right to stop the goods *in transitu*. But this is while the goods are going to the first vendee. After the first vendee has resold them and put them on their second passage, the transit, between the vendor and his vendee is at an end. But a resale will not defeat the vendor's right to stop the goods *in transitu*, until they have reached their first destination, unless the bill of lading is assigned, or the vendee has anticipated the arrival, and taken possession, which he may do, or the vendor consents to the resale, which is this case from the beginning. So that this case never involved the right to stop *in transitu* towards Barnes & Brothers, as no such transit ever existed, or was contemplated. All the transit there ever was in this case is one towards the second vendee, when the delivery by the vendor to the carrier was for that purpose. *Lickbarrow v. Mason*, 1 Smith's Lead. Cases, 433 and notes. The case of *Coats v. Railton*, 6 B. & C. 422, goes upon the ground that Butler, Knes & Co., of Lisbon, were the real purchasers although the purchase was in the name of Butler & Brothers of London, (the partners in both houses being the same except Knes,) although to be paid by a bill upon Butler & Brothers. That bill being dishonored, the vendees still remained liable for the price, and the right to stop *in transitu* still continued. Unless the case is explainable upon the ground that both houses were virtually the same, it is at variance with all the other cases upon this point. And BAYLEY, J., in this case says, that when the goods are bought to be sent to another, and this named to the vendor as their destination at the time of the purchase, the transitus is at an end whenever the goods are put upon this transit; citing *Leeds v. Wright*, 2 B. & P. 320, which would seem to be altogether at variance with the purpose for which he cites it, unless the two houses are treated as virtually one in interest, and the delivery at Lisbon as a delivery to the vendees themselves.

Judgment affirmed.

Heirs of Blanchard v. Heirs of Blanchard.

THE HEIRS OF ANNA BLANCHARD v. THE HEIRS OF BARNARD
BLANCHARD.

Will.

It is not necessary to the due execution of a will that all the attesting witnesses should actually see each other sign it. It is sufficient if the testator and witnesses are all in the same room when the signatures of all the witnesses are made, and are there for the purpose of taking part in the execution of the will, and have an opportunity to see all the witnesses sign the will, if they choose to turn their eyes in that direction.

The mere intention or desire on the part of a testator to revoke his will, not carried into effect in the method prescribed by the statute, does not operate as a revocation.

It seems that if such intention be defeated by fraud, a court of equity would interfere to prevent the guilty person from taking advantage of his own wrong; and to restore the fund to the channel from which it was diverted by the fraud. BENNETT, J.

APPEAL from the decision of the probate court for the district of Randolph, refusing the probate of an instrument purporting to be the last will and testament of Barnard Blanchard.

It appeared that one of the three attesting witnesses to the will, though present in the same room when the testator and the other witnesses signed their names to the same, did not actually see one of the other witnesses make his signature, being engaged in looking in another direction at that time.

The defendants offered to prove that about ten days before the death of the testator, he procured the will in question for the purpose of revoking it, and sent for a magistrate and witnesses to be present at its revocation, but before they all arrived the will was taken from him without his consent, and withheld from him, and that for that reason the revocation was not consummated; that afterwards he applied to the person who had the will, to get it so that he might revoke it, but his request was not complied with; and that he supposed it to be necessary to have a magistrate and witnesses present to enable him to make a valid revocation of the will.

The plaintiffs objected to this testimony and it was excluded by the court, to which the defendants excepted.

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The defendants requested the court to charge the jury that the attestation of the will was not sufficient, but the court declined so to charge, and did charge the jury that if the witnesses who signed the will signed it in the presence of the testator and of each other, and they were present together in the room with the testator when he signed it, for the purpose of being witnesses to his signature, and he signed it in their presence, declaring it to be his last will and testament, and some of the witnesses saw him sign it, and some of them saw the others sign it, it was not necessary to a due execution of the will that all the witnesses should in fact see the testator and all the witnesses sign it, provided they might have seen such signatures made if they had turned their eyes in that direction at the time they were made.

To the refusal of the court to charge as requested, and to the charge as given, the defendants excepted.

E. Weston and William Hebard, for the defendants.

L. B. Peck and J. B. Hutchinson, for the plaintiffs, cited in regard to the exclusion by the court of the testimony concerning the attempted revocation of the will; *Giles v. Giles*, 1 Cam. & Nor. 174, (note to 2 Greenleaf's Ev. 689); 2 Am. Lead. Cases 690; *Doe v. Harris*, 6 A. & E. 209; and, in regard to the attestation of the will, Comp. Stat. 327, sec. 6; *Dean v. Heirs of Dean*, 27 Vt. 746; 1 Greenleaf's Ev. 349, sec. 272; 2 *Id.* secs. 676-678.

BENNETT, J. This case involves the validity of the execution of the will of Barnard Blanchard, and also a question whether it had been revoked by him. Our statute requires that wills, in order to be effectual to pass any estate, either real or personal, should be in writing, and signed by the testator or some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses, in the presence of the testator and of each other. And they are not to be revoked unless by implication of law, or by some will, codicil or other writing executed in the same manner which is prescribed for the execution of wills, or by burning, cancelling or obliterating,

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with the intention of revoking, the will on the part of the testator.

It was claimed on the trial that the jury must find, not only that all three witnesses to the will and the testator were present in the same room together when the will was signed and witnessed, but all and each one of them must have seen the others write their names, in order to render it a valid will.

But the court, in substance, told the jury that it was not necessary that all the witnesses should in fact have seen the testator put his name to the will, or that each witness should have seen the other witnesses witness it, provided they were all in the same room with the testator and might have seen the testator sign it and each of the other witnesses attest it.

We apprehend no fault is to be found with the charge. All that the statute requires is, that the will should be in writing and signed by the testator, and attested by three or more credible witnesses in the presence of the testator and of each other. If the situation of the parties were such that the testator might have seen the attestation, and each of the witnesses might have seen the attestation of their associates, it is all that is required. The statute does not require the testator to sign the will in the presence of the witnesses, but the witnesses must attest not only in the presence of the testator, but in presence of one another. And if they were in the same room and might have seen the attestation of one another, that is held to be an attestation in the presence of the testator and of one another. Such has been the repeated adjudication of courts.

It is clear that the facts offered to be proved would not have constituted a revocation of the will. Though the testator might have procured the will for the purpose of revocation, and sent for a magistrate and witnesses to be present at its revocation, yet this does not create a revocation; and the fact that the will was taken from the testator without his consent, and kept from him, and the revocation by this means prevented, cannot alter the case. Though at common law the mode of proof might, perhaps, be immaterial, if the intention to revoke a will was fully established, and an attempt to cancel a will might have the same effect as an actual cancellation, yet the statute prescribing how a will shall be revoked has changed the rule, and now that intention must be

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wholly or partially consummated. If the intention of the testator to revoke is defeated by *fraud*, it may be quite probable a court of equity would interfere to prevent the guilty person from taking advantage of his own fraud, and to restore the fund to the channel from which it was diverted by the fraud ; but that is a point not before us, and of course does not receive the consideration of this court.

Judgment affirmed.

JEWETT, TIBBETT & CO. v. MOSES BROCK AND OTHERS.

Homestead.

A mortgage of a homestead executed by the owner thereof, who was a married man, his wife not joining in the same, contained, after the description of the premises, the following words: "*saving always the homestead exemption in the same.*" Held, that this reservation did not alter the construction of the mortgage, the effect of which so far as the husband was concerned, was, after breach of condition, to pass the title to the whole premises, except the equity of redemption.*

EJECTMENT. The only question considered by the supreme court in this case concerned the construction of a certain mortgage made December 30, 1850, by Samuel Eastman to Samuel A. and Thomas L. Tucker, of a piece of land in Newbury, and the buildings thereon, then and for several years thereafter occupied by Eastman, who was a married man, as a homestead. The mortgage, after describing the premises conveyed, contained the following words: "being the same land on which I live; *saving always the homestead exemption in the same.*"

The plaintiffs' claim to the land rested on a levy of an execution against Eastman subsequent to this mortgage, issued upon a judgment recovered on a debt incurred previous to December 1st, 1850, and their right to recover in this action did not exist, unless the above recited reservation exempted from the operation of the

* NOTE.—But see acts of 1860, No. 36, p. 30.—REPORTER.

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mortgage during Eastman's life a homestead interest, which was not subject to attachment upon any debts of Eastman's except those incurred before December 1st, 1850.

The county court held that the reservation did not create any such exemption, but that the title to the whole premises so far as Eastman was concerned, passed by the mortgage, and therefore judgment was rendered for the defendant, to which the plaintiffs excepted.

A. Underwood and C. B. Leslie, for the plaintiffs.

—— ———, for the defendant.

BENNETT J. This is an action of ejectment, and several questions have been raised upon the argument; but in the view we have taken, it becomes necessary to consider only a single one. This suit is brought to recover the premises designated in the levy of the plaintiffs' execution, as the homestead of Samuel Eastman, the judgment debtor, and both parties claim under Eastman; and the question which lies at the threshold of this controversy is, what is the effect of the mortgage deed from Eastman to the Tuckers? It conveys by a general description of boundaries, the premises where the grantor then lived, "*saving always the homestead exemption in the same.*" In *Howe v. Adams*, 28 Vt. 541, it was held that the owner of a homestead having a wife might convey it by his own deed without joining his wife in it, so as to vest in the grantee a superior title to that of a subsequent attaching and levying creditor upon a demand, which accrued before the 1st of December, 1850, and as to whose claim the homestead was for that reason not exempt from attachment and execution. This homestead exemption does not *de facto* vest any title in the wife, but is nothing more than an *inchoate lien* upon the estate of the husband in her favor, and is subject to contingencies, and is to be asserted only for the benefit of the wife and family; and we apprehend that nothing is reserved to Eastman under his mortgage deed to the Tuckers, but an equity of redemption in the whole premises. The expression "*saving always the homestead exemption in the*

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same," we think refers to the contingent rights which the wife might set up to a homestead on the premises as conveyed, and that it was not designed to reserve any portion of the premises to the husband. As to the husband the operation of the deed is the same as if it contained no such saving. With this construction the case is like *Howe v. Adams*, and should be governed by that case. Under this view the plaintiffs cannot succeed with their action, and there is no occasion to consider any other point.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
AT THE
GENERAL TERM,
HELD AT
BURLINGTON, MAY, 1859.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE.	
HON. MILO L. BENNETT,	} ASSISTANT JUDGES.
HON. LUKE P. POLAND,	
HON. ASA O. ALDIS,	
HON. JOHN PIERPOINT,	
HON. JAMES BARRETT,	

JEROME J. HILL v. THE WESTERN VERMONT RAILROAD COMPANY, AND MYRON CLARK.

Railroads. Ejectment. Execution.

The Western Vermont Railroad Company, before their road was laid out or surveyed, procured a bond from B. to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary,

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and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road and requisite accommodations. The survey of the road, made by order of the directors, designated certain land belonging to B., as depot grounds, and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff, having recovered a judgment against the company, levied his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land embraced in the levy was never necessary to the company for railroad purposes, and would not become so prospectively; *Held*, that by B.'s contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations: that under their charter the company could not acquire any more land, or any greater estate therein, for the purposes of a road bed or stations than was really requisite for such uses: that the estate so requisite was not one in fee simple, but merely an easement, and was therefore not subject to be levied upon by the creditors of the company: that when taken for such purposes the rule was the same whether the land was taken compulsorily by condemnation and the award of commissioners, as to its extent and price, or under the agreement of the parties as to one or both of these particulars: that under their charter the directors had power to lay out their road and stations as they saw fit, and that so long as they acted in good faith, and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive.

EJECTMENT for three acres and ninety-three rods of land in Manchester. The case was referred and the referee found the following facts:

The Western Vermont Railroad Company, by their directors, on the 10th of March, 1851, surveyed and laid out their road bed and appurtenances, including in such survey, as and for depot grounds, a certain tract of land in Manchester, of which the demanded premises were a portion. This survey was recorded in the proper town clerk's offices.

This tract of land was purchased and taken by the railroad company under a bond, executed to them by Josiah Burton, dated September 25th, 1850, the condition of which provided that Burton should, on reasonable request, convey to the company such lands, owned by him, as should be required for their railroad, on or near the line thereof, at a certain price per acre. The company paid Burton the stipulated price for the land at the time they took it, but no actual conveyance thereof was ever executed to them.

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The plaintiff brought an action against the company on the 18th of May, 1853, upon which he recovered a judgment, and took out an execution, which, on the 24th of November, 1854, within five months after the rendition of the judgment, was levied upon the demanded premises. The defendant Clark was in possession of the land in controversy, under a lease of the railroad executed by the company to him on the 3d of September, 1853.

Before the referee the plaintiff claimed to recover the land in question, under his levy, on the ground that both at the time of the survey of the road, and ever since then, it was not necessary for the purposes contemplated by the charter of the company, and offered testimony to show such to be the fact. The defendants objected to such testimony on the ground that the action of the directors of the company in surveying and laying out the land as depot grounds, was conclusive as to its necessity.

The referee received the testimony and found that a portion of the demanded premises (describing it) was not when the land was taken by the company, and had not since been, and was not prospectively necessary for the purposes of the railroad, and that such portion had not been used by the defendants except for agricultural purposes, and also that a portion had remained in the possession of Burton by sufferance of the company, they claiming, however, to hold it by reason of their survey thereof and the payment of the price therefor to Burton, as above stated.

The charter of the Western Vermont Railroad Company provided that their directors might cause such examinations and surveys of the road to be made as they should deem necessary; and that the road, when so surveyed and the survey recorded, should be deemed the line on which the road was to be constructed; and that the corporation might enter upon and take possession of such lands as were necessary for the construction and maintenance of their railroad, and the requisite accommodations appertaining thereto, with a provision for the appraisal, by commissioners, of the land so taken, if the parties should disagree as to the price.*

Upon this report, the county court for Bennington county, at the June Term, 1858, rendered judgment for the defendants, to which the plaintiff excepted.

* See Laws of 1845, pp. 77-78, secs. 4 and 7.

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Roberts & Chittenden, for the plaintiff.

H. Canfield and E. J. Phelps, for the defendants.

I. The right acquired by a railway company in land taken for use under the charter, is a mere easement, or right of way. When the use ceases, the land reverts. Upon no other principle could the application of the right of eminent domain to such a case be sustained; *Jackson v. R. & B. R. R. Co.*, 25 Vt. 151.

II. Whether the land is acquired by deed or by statute proceeding is immaterial. The right is the same in either instance. The company have no power to hold for any other purpose. And the deed is regarded as given in consideration of the right of the company to take *in invitum*; Charter, sec. 7 and 8; *Redfield on Railways*, 105–127 and cases cited in notes.

III. The right thus acquired is not subject to levy.

1. It is in this respect like any other easement, and is incapable of being taken on execution.

2. The title of the company is inseparable from the franchise. If the land could be taken from them by creditors, and applied to a purpose foreign to that specified in the charter, it would at once revert to the original owners; *Redfield on Railways*, 606.

IV. The same principle applies to that portion of the depot grounds, which is found by the referee in the present case, to be unnecessary for the purposes of a railroad.

This, like the rest, was included in the original survey and location of the road. And it is not denied that it was taken by the directors in good faith, and for no other purpose than that authorized by the charter.

Their action was therefore conclusive as to the necessity and propriety of including it within the limits of the road.

1. They were public officers. The charter confers upon them the power and the duty of determining the extent and location of the land required. This duty is as important to the public as to the company. In the exercise of it their action is equally conclusive with that of selectmen or commissioners in the matter of highways; *Redfield on Railways*, 122, 129, 148, 191.

2. But if they are not to be regarded as public officers, the charter still secures to the company the right to take and keep

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such land as in the judgment of their directors may be necessary.

And though this right must of course be exercised reasonably, and in good faith, only the State and the land owners can complain if the directors take more than is actually required.

Great foresight and sagacity are often requisite to anticipate what may be the future requirements of such enterprises, destined to be perpetual, and as yet but in their infancy. After the road is once located and finished, the right to acquire land by statute proceedings cannot be exercised further. It would certainly be intolerable, if the limits of the road as established by the directors, with the acquiescence of the land owners and the public authorities, were to be forever open to be changed and contracted, by juries and other tribunals, at the instance of every creditor who might choose to try the experiment.

Nor would it be possible for the creditor to avail himself of the fruits of his levy, if permitted to enforce it. So soon as the land was thus diverted from the purpose for which it was originally taken, the title acquired by the company would terminate, and it would revert to its former owners. The right of eminent domain could hardly be exercised by the State for the purpose of acquiring land to pay the private debts of a corporation.

V. Independent of the general question, there are insuperable objections to maintaining this action.

1. The levy and appraisal was entire and indivisible, as to all the land included. A part of this land is found by the referee to be necessary for the use of the road. It will hardly be claimed that this portion was subject to levy, and if the levy is void as to part, it is void as to the whole; *Susquehanna Canal Co. v. Bonham*, 9 Watts & Sergt. 27; *Howe v. Blenden*, 21 Vt. 315; *Amant v. U. C. & Pittsburgh R. R. Co.*, 13 Sergt. & R. 310.

2. The company had at the time of the levy no legal title whatever to the land included in it, and no possession of any part of it. They had at best but an equitable right.

It is clear that, under these circumstances, an action of ejectment founded on the levy cannot be supported; *Wood v. Scott*, 14 Vt. 528; *Waterman v. Cochran*, 12 Vt. 699; *Whittlesey v. McMahon*, 10 Conn. 188; *Botsford v. Beers*, 11 Conn. 374.

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REDFIELD, Ch. J. This is an action of ejectment to recover possession of certain lands which the defendants purchased of one Burton for depot purposes, about one of their stations, and which the referee in this case has found were not necessary for the present or prospective use of the company, for that purpose, the excess, according to the opinion of the referee, being some acres. The plaintiff, being a creditor of the company, levied upon this excess, together with a considerable number of acres more which the referee finds are necessary for the use of the company, for the purposes for which they were procured. The appraisal and levy was upon the entire portion of land, both that which was and that which was not necessary for the uses of the company.

The company, before they surveyed their road, contracted with Burton for the conveyance of "such lands" owned by him "as shall be required" for the company's road, "on reasonable request." The land was subsequently designated by metes and bounds, and the money paid for the piece, but the land has never been conveyed to the company.

The first question arising in the case is as to the extent of estate which Burton is bound to convey to the company. The plaintiff claims that this is an estate in fee simple, as the contract binds him to convey such lands "owned by him" as shall be required by the company. This is, no doubt, the fair and natural construction of such a contract between ordinary parties. If the land is to be conveyed and is defined as land "owned" by the obligor, nothing less could be fairly intended, in ordinary cases, than an estate in fee simple. But here the land is purchased and to be conveyed to the company for their use, "such as shall be required by them." We do not understand by this, all the lands they might ask for, but such as their powers and functions and business required. We do not think the scope of the bond could fairly be made to extend beyond this. It would be very unreasonable, as it seems to us, to construe this bond as extending beyond this and including, at the election of the defendants, all the land owned by Burton, and lying near the line of the railway.

So too it seems to us, that as Burton, by the fair construction of the bond, was only bound to convey such lands as were rea-

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sonably required for the legitimate uses of the company, so he was only bound to convey such estate therein as they required for those uses. If the extent of territory could fairly be defined and limited by the general objects and purposes of the contract, which is a familiar rule of construing all contracts, and as applied to a case of this character, a most significant and unquestionable one, as we think, the same rule also applies with equal force to the estate to be conveyed. A contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a particular use, must of necessity carry the implication of such limitation upon the estate to be conveyed.

We think, therefore, that the bond, as originally given, would not have bound the party to convey more land than the company fairly required for their legitimate uses under their charter, or any greater estate in the land than such uses justly required. That is just what the company were empowered to take compulsorily. And their charter, as we think, was not intended to give them power to acquire any more land or any greater estate in such land, for the purposes of a road bed or stations, than was really requisite for such uses under their charter. We do not intend to say that if they purchased and took the conveyance of the fee of land for these purposes, they could not hold it or convey it, although some courts have so held. Nor do we intend to intimate any decided opinion that they may do this. The general provisions of the charter of this company are much like other charters in this and the other States, and similar to the general railway act, and seem to have reference to acquiring the right to such an estate in the necessary lands as is requisite for the road bed and other incidental use and accommodation of the company, in their prescribed and necessary business.

The company may purchase lands for wood and timber, for their ordinary uses and may, no doubt, purchase, take and hold, and also convey the fee simple of such lands. We are not inclined here to question the right of this company to take the fee of lands by way of gift, or in payment of debts due them, either by voluntary conveyance or by levy, *in invitum*. It is not important to discuss these propositions here. They may all be conceded.

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But they do not affect the question, what extent of land and what estate the company were expected to take by purchase or gift, or by condemnation, for their road bed and depots. We think it very obvious, from this charter and many others we have examined, where the quantity of estate is not defined, that it should be construed as we have already intimated in regard to the bond of Burton, according to the object and purport of the grant, and the necessities or wants of the corporation thereby created. It seems to us to be leaving all just limits of construction to go beyond this. It is certain, as already intimated, that this is the ordinary rule of construing contracts. And statutes are generally construed much after the same rules as contracts, and especially statutes of this character, which are much in the nature of contracts between the sovereignty and the shareholders, or, strictly speaking, between the sovereignty and the corporation. In other words, the charter is a grant of certain franchises and immunities, upon certain terms and conditions, and with certain specified or implied limitations. These conditions and limitations are the consideration and the counterpart, so to speak, of the grant. By accepting the grant the corporation bind themselves to perform the obligations and duties reasonably and fairly implied by the conditions of the grant. So that the charter should receive the same construction as any other contract of a similar character.

One of the important franchises of railway corporations, and the one which distinguishes corporations of this public character from ordinary business corporations, on account of its sovereign or prerogative character, is that right which in the sovereign is called eminent domain, which is the power to invade private property and appropriate it to its own purposes. The right to exercise this function is made dependent upon rendering an equivalent in money, and the implied compact not to acquire more land than they need. And the charters, or general laws, in most of the American States, allow the details of the appropriation of lands to the use of railways, to be arranged, either by the judgment of certain public functionaries designated for that purpose, or by the consent of the land owner. But in the latter mode even, the proceeding is, in some sense, compulsory. The land owner does not stand precisely in the position of an ordinary proprietor in

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the market. He has no election whether he will part with his land or not, but only whether he will fix the terms by negotiation or by the appraisal of the commissioners, or the court. In either mode of appropriating land for the purposes of the company, where they have by their charter the power to take it compulsorily, there is this implied limitation upon the power, that the company will take only so much land or estate therein as is necessary for their public purposes. It does not seem to us to make much difference in regard to either the quantity or the estate, whether the price is fixed by the commissioners or by the parties. For under this charter it is the act of the directors which designates the extent of land to be taken, and thus far the taking is compulsory and strictly under the powers granted by the charter.

In regard to the mode of appropriating land to the purposes of the road bed and depots of a railway company, it is obvious that it should be done in some way which shall be judicial and final, for the time at least. This is necessary both for the company and the land owner, and when done in the mode pointed out in the charter, it must be final, or should be so, unless some power is reserved, either expressly or impliedly, to change the location of the road, as in the defendants' charter seems to be given, or to enlarge its facilities with the advancement of business, which this charter does not give in terms. This is not ordinarily reserved to railways. When once located the location is commonly regarded as final. They must take such lands as will be likely to accommodate their business, both present and prospective. It doing this it would not be wonderful if they should take more, sometimes, than every one regarded as necessary. The same may be true of their road bed. A jury or referee might well consider, in many cases, no doubt, that at many points four or five rods, or even three rods in width, was just as beneficial, for all the purposes of the road, as six rods, which some of the early chartered roads in this State are allowed to take and do take. The same may be often true of the land taken for depot accommodations.

But if the road bed or land for stations is taken in the mode prescribed in the charter and general law of the State, whether by the judgment of the commissioners, as to its extent as well as

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the land damages, or by the act of the directors through their surveyors and engineers, as to its extent, and the appraisal of the commissioners as to its value, or by the directors as to its extent, or the agreement of parties as to the price, as in this case, when once taken in the mode prescribed in the charter, as this land was taken, it is regarded as well settled that the land so taken is not subject to the levy of an execution. This is put upon the ground, and justly we think, that the estate, being a mere easement for a particular use, is not of the quality and character which by the statute is made subject to a levy. This is not an estate in fee, or for life, or years, or indefinitely, or an equity of redemption, which are the estates defined in the statute. But it is an easement, a right to use the land in a particular mode for a particular purpose, and which cannot be transferred to an ordinary person having no right to use it in that mode or for that purpose, since the estate would cease and the land revert, the moment it was put to any other use than the one designated in the charter or statute, by or under which the appropriation was made.

So that whether the company take more or less, if taken for these purposes and no other, and only an easement is acquired by the company, it is not an estate which can be transferred by a levy to the creditors of the company, or by any conveyance, in parcels, probably. But of this we need not speak. It is certain the statute has not provided for levying upon any such estate. And this we think is the only estate for which the company contracted with Burton, or which he is bound to convey to them.

And as to the quantity of land taken, if the directors of the company have power to lay out their own road in any place they choose, and to the extent of five rods in width, and to take such lands for depot purposes as they deem expedient, and they have acted in good faith, we do not see very well how their proceedings can be brought in question by any one. It may have been the folly of the legislature to grant any such power to the directors of the company, but if they have done so, and this power is altogether unlimited, unless they act rashly or in bad faith, it is not very obvious how they are to be controlled in the matter. No doubt if they act recklessly or extravagantly, so as to indicate either utter incompetence, or corruption, or undue influence,

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or bad faith, a court of equity, at the suit of the land owner or the stockholders, would set the matter right. But this would thus be done in such a mode as to settle it definitely and not to leave it subject to the confusion consequent upon subjecting it to the action of independent tribunals, in regard to portions of the land taken for the same purpose whose decisions would almost inevitably produce more or less confusion and uncertainty. But so long as the land is appropriated to the road bed and depot purposes in the very mode prescribed in the statute, we do not very well comprehend how it can be appropriated in parcels to the payment of the debts of the company, by means of levies, even if the fee had been conveyed to the company.

In cases where the company purchase lands, not intending or supposing they are to be used or are requisite for depot purposes, as is sometimes the case, because they can obtain them in that mode upon more reasonable terms, and where, as in such cases is more usual, the conveyances profess to convey the fee simple, and no separation has been made between such of the lands as are required for depot purposes and such as were never supposed to be requisite for any such purpose, it is not necessary to give any intimation what might be the rights of creditors or what course should be pursued to secure such rights, such as they are, if any.

As the company had no such estate in these lands, or any such extent of territory as could be subjected to the levy of executions, at the suit of their creditors, treating their rights the same as if Burton had already executed all the conveyance which a court of equity would compel him to execute, it is not necessary to consider the other questions in the case.

Judgment affirmed.

Lyman, Admr. v. Lyman et al.

ELIAS LYMAN, *Administrator of the Estate of ANNA L. SPAULDING*, v. GEORGE LYMAN and EPHRAIM D. BRIGGS.

Mortgage. Chancery.

[IN CHANCERY.]

G. mortgaged land to E. and subsequently conveyed a portion thereof to L. with the usual covenants of warranty, &c., and afterwards mortgaged the remainder to B. Each of these conveyances was recorded before the execution of the one next subsequent. Afterwards E., knowing of the mortgage to B., released the portion conveyed to L. from his mortgage. *Held*, on a bill of foreclosure brought by E. against G. and B., that the latter was not entitled to a deduction from E's mortgage proportionate to the value of the estate released in comparison with that of the land originally included in the mortgage.

When lands subject to a common burden are sold in parcels at different times, and the deeds are recorded in the order of their execution, the purchasers of the different portions must, as among themselves, contribute to the common burden in the inverse order of the conveyances.

BILL IN CHANCERY to foreclose a mortgage. The facts in the case are sufficiently stated in the opinion of the court.

George F. Edmunds for the orator.

Roberts & Chittenden for the defendant Briggs.

REDFIELD, CH. J. In this case the defendant, Lyman, gave a mortgage to the orator. He subsequently conveyed a portion of the premises to one Lewis Lyman, with full covenants, and subsequent to that gave the defendant Briggs a mortgage of the remaining portion of the estate mortgaged to the orator. These conveyances were all upon record, and each one before the execution of the one next following it. And subsequent to all these conveyances being on record, the orator released that portion of the estate conveyed to Lewis Lyman, and with actual knowledge that the defendant Briggs held a mortgage.

The orator now seeks to obtain a foreclosure of the mortgage upon that portion of the estate not released, and which was subsequently mortgaged to the defendant Briggs. Briggs claims a deduction from the mortgage in proportion to the value of the

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estate released, as compared with the remaining portion. This is undoubtedly equitable, provided any such burden could have been placed upon that portion of the estate if it had not been released.

It seems to be well settled by all the decisions, both in this country and in England, that in a case where a general burden rests upon an estate, and a portion of it is conveyed, the grantee of such portion is entitled to redeem the mortgage or incumbrance, and be subrogated to the rights of the owner, and thus enforce it against that portion of the estate still remaining in the hands of the debtor; 2 Story's Eq. Jur. sec. 1233 *a.* and cases cited. This proposition is unquestionable.

Before the conveyance to Briggs then, the orator's mortgage, as between Lewis Lyman and George Lyman, was chargeable upon the portion of the estate still in the mortgagor's hands. The inquiry then arises whether his executing a mortgage of this portion of the estate, or what was the fact, of the whole estate subject to the conveyance to Lewis Lyman, changes the equitable burden of the orator's mortgage, as to the estate mortgaged to Briggs. The question does not seem to have been decided in any case in this State. The case of *Chittenden v. Barney & Howe*, 1 Vt. 28, seems to assume the ground that the first mortgage is to be apportioned upon the different parcels of the whole estate, conveyed to different persons, according to their value, without reference to the order of time of the several conveyances. It is said in *Gates v. Adams*, 24 Vt. 70, that this kind of equal apportionment of the incumbrance upon the different parcels of land, cannot in equity be made compulsory upon the first incumbrance of the whole estate, but that the subsequent purchasers may redeem the whole incumbrance and compel contribution among themselves. But the question in regard to any priority among themselves does not seem to have arisen there.

But this question has been repeatedly made in other American States, and the current of American authority seems to be almost uniform in favor of charging the several portions of the estate conveyed in the inverse order of the time of such conveyances. This rule has been repeatedly recognized and acted upon in the State of New York, beginning with *Gill v. Lyon*, 1 Johns. Ch.

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447. The same rule is more or less directly adopted and acted upon in *Clowes v. Dickerson*, 5 Johns. Ch. 235 ; S. C. affirmed in 9 Cowen 403 ; *Skeel v. Sprakee*, 8 Paige 182 ; *Stuyvesant v. Hall*, 2 Barb. Ch. 151 ; and the other cases cited by the orator's counsel. See also 1 Hilliard on Mortgages, 326, and cases cited in notes. This rule is approved in the American notes to Leading Cases in Equity, 2 Vol. 208. There will here be found an extensive and very satisfactory review of the American authorities upon this subject. This general rule seems to have been adopted in most of the American States, but with occasional qualifications, as where the first purchaser of a portion of the whole estate stipulated in his purchase to pay a portion of the general incumbrance, or remains indebted to the vendor for the purchase money, which is still secured upon the land, as in *Allen v. Clark*, 17 Pick. 47.

Mr. Justice Story, in his Equity Jur. sec. 1233 a. raises a query in regard to the soundness of this view, and intimates an opinion that some of the English cases to which he refers, do not countenance such a mode of marshalling the equities among the different purchasers. But the case of *Averall v. Wood*, 10 Eng. Cond. Ch. 498, one of the cases referred to by the learned author seems rather to favor the American rule upon the subject, where there is full notice to all parties. And if there is any hesitation in the English equity courts, in regard to extending the equities between the prior purchaser of a portion of the estate who pays for the same and takes covenants of warranty, and the vendor who still retains a portion of the estate, both parties resting under a general burden, to the subsequent purchaser of the remaining portion, it rests unquestionably upon the want of notice, either actual or constructive, there being no general registry system in that country, as is well known.

The registry of a subsequent conveyance is not, in general, constructive notice to a prior purchaser or incumbrancer, but the registry of a deed is notice to those acquiring a subsequent interest in the estate. And with this construction, or actual notice of the state of the title and of the subsisting equities, it seems to us highly reasonable and just that, as among themselves, the purchasers of different portions of the estate are to contribute to the common burden, in the inverse order of their acquiring title.

This remark
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Defendant Briggs therefore had no equity, as against Lewis Lyman, having purchased with knowledge of his prior equity against the remaining portion of the estate not conveyed by the mortgagor.

Decree affirmed and case remanded.

GEORGE L. MUSSEY v. WILLIAM SCOTT, *Appellant*.

Forcible entry and detainer. Trespass.

If one have the right to enter and take possession of premises in the occupancy of another, his entry will be legal and not contrary to the statute concerning forcible entry and detainer, if made while the other party is temporarily absent from the premises, leaving no one there, even though it be necessary to force the door to gain admittance.

The plaintiff having the right to the possession of a house occupied by the defendant, and having given him notice to quit, afterwards, while the defendant was temporarily, for the day only, absent from the house, which he had fastened upon leaving, entered the premises by forcing open the door, and placed the defendant's furniture in the street, and fastened up the house and left it. The defendant on returning, forced open the door and reentered and occupied the premises. *Held*, that the plaintiff's entry was the exercise of a legal right in a legal manner, and that he could maintain trespass *qu. cl.* against the defendant for his subsequent entry.

TRESPASS *qu. cl.* Plea the general issue and trial by the court at the March Term of the Rutland county court, 1858, PIERPOINT, J., presiding.

The plaintiff showed in evidence title in himself to the *locus in quo*, and the following facts in addition :—In June, 1854, he made a verbal contract with the defendant by which he sold him an acre of land including the premises in question, and was to put up a house upon it, excepting the cellar, and the defendant was to pay him twenty dollars toward the land the first year, in labor, and twenty dollars the second year, and also toward the house what he could the first year, and fifty dollars each year thereafter until he had paid two hundred dollars for it. The property was to remain the plaintiff's until paid for. The defend

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ant accordingly made some payments, took possession, and the plaintiff having built the house contracted for, the defendant occupied it as his own, and continued to do so up to the commencement of this action, except as hereinafter stated. He failed, however, to make all the payments stipulated for, and on the first of March, 1856, the parties made a new contract, also verbal. By this the defendant agreed to pay two hundred and fifty dollars more for the land and house, at the rate of fifty dollars a year, in monthly payments, with the interest accrued on the whole sum, and further agreed that if he failed in making any monthly payment, the plaintiff might enter and take possession of the premises, and put his (the defendant's) things into the road. The defendant utterly failed to make any payments whatever after this, and on the 16th day of October, 1856, the plaintiff demanded the possession from the defendant, and on the 18th day of October, 1856, in the absence of the defendant, entered into the premises by forcing open the door of the house, which the defendant had fastened on leaving the house for the day only, and after setting out the defendant's furniture, &c. into the road, fastened up the house, and posted up a notice on the door that he was in possession. It also appeared that the defendant could not read. The same day the defendant reentered the premises, forced open the house, and put his furniture, &c. back into it, and continued to occupy it till the commencement of this suit. This was the trespass complained of by the plaintiff.

The plaintiff claimed that he had by his entry into the premises, as above described, become lawfully possessed of the same, so far at least as to entitle him to maintain the present action for the subsequent entry of the defendant. But the court decided that the entry of the plaintiff, as above described, did not revert the plaintiff with the possession of the premises, so that he could maintain the present action against the defendant for his subsequent entry into the premises, and rendered judgment for the defendant, to which the plaintiff excepted.

S. H. Hodges and E. Edgerton, for the plaintiff.

Thrall and Briggs & Nicholson, for the defendant.

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BENNETT, J. No question has been made, but what upon the facts stated in the bill of exceptions, the plaintiff had the right to reenter upon the premises, and we think none can be well made. The only question is, did the plaintiff exercise a *legal right in a legal manner*? If he did, his reentry must have the effect to vest in him the possession of the premises, and that possession must be a *legal one* against the defendant.

This is not such a case as *Dustin v. Coudry et al.*, 28 Vt. 631. In that case the entry was by force and a strong hand and against the strenuous resistance of the plaintiff and his friends; and the family were actually expelled from the house at an inclement season of the year, and both the family and the household effects were turned into the public highway. The manner of the entry was clearly illegal and in violation of the statute, which forbids the use of force in *entering* or in *detaining*. The defendant in that case did not exercise a *legal right in a legal manner* against the plaintiff, and of course could not stand upon a possession so obtained against him. The defendant was bound to restore the possession and place the complainant in *status quo*, and then proceed in a legal manner to try the title.

But this is a different case. Here the tenant had no family. He had gone away and left no one in possession, and the house *de facto* was vacant at the time the entry was made, and the entry was made by forcing open the door of the house which the defendant had fastened when he left the house in the morning, and there is no pretence that it was made in a *riotous* and *tumultuous manner*, or in such a way as would even tend to a breach of the peace. It does seem to us that in this case a *legal right was exercised in a legal manner*. The plaintiff, owning the property and having a right to enter, might, if he chose, force open his own door, and it was not for the defendant to complain of the act. It may be said the defendant only left the house for a temporary purpose, with a view to return. That no doubt is true, and that must always be the case. If the possession had been *abandoned*, no question could ever arise of the kind in such cases. We apprehend this case is within the case of *Turner v. Meymott*, 8 E. C. L. 286, and many others of the kind. The defendant in this case had gone away and had not left his family in possession, for he

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had none. He was *de facto* out of possession, and no one was in possession *de facto* at the time the plaintiff reentered into the possession of the premises. For the purposes of this question the premises may for the time being be considered *vacant* though not abandoned by the defendant.

In the case of personal property, the party injured may have redress by his own *mere act* by what is termed *recaption*, though this must not be done in a *riotous manner* or *attended with a breach of the peace*, and a remedy of the same kind may be had for *injuries* to real estate by an *entry* on lands where another person has the possession without any right; but in such a case it must be peaceable and without force.

In the case of *Wilson v. Hooper et al.*, 12 Vt. 655, this principle was applied to a mortgagor as against the mortgagee. COLLAMER, J., aptly remarks, "it appears to us most reasonable to allow any man peaceably to assert his legal right by his own act, without driving him to an action;" and in *Beecher v. Parmele et al.*, 9 Vt. 356, it was held that a mere intruder upon land may be forcibly expelled from the land, and if a trespass is committed upon the person of the intruder he must resort to his action for such injury to his person. Since the very full and able discussion of this whole subject by the present learned Chief Justice in the case of *Iustin v. Cowdry et al.*, 23 Vt., it would be a useless work of supererogation to go over the ground again. That case simply decides that the entry cannot be made *by force and a strong hand*, and thereby turn the tenant, his family and his effects, out of the possession of the premises, and the distinction between that case and this is well marked.

As the plaintiff in this case exercised a *legal right* in a *legal manner*, his possession of the premises was lawful against the defendant, and he may well have this action against him for the subsequent disturbance.

Judgment reversed and case remanded.

Keyes v. Prescott.

STEPHEN S. KEYES v. JESSE PRESCOTT.

Joinder of trespass and trover.

A count in trespass for cutting down and carrying away a tree from the plaintiff's land, which commences like a count in trespass *qu. cl. fr.*, but concludes with an allegation that the trespass is "contrary to the statute in such case made and provided, whereby the plaintiff is entitled to recover of the defendant treble the aforesaid value of said tree, &c." will be construed to be a count for the penalty prescribed by the statute, (Comp. Stat., sec. 32, p. 550,) and not a count in trespass at common law.

It is not competent for the county court to allow an additional count in trover for the tree to be filed to such a count upon the statute, either at common law, or by virtue of the statute (Acts of 1856, p. 13,) which allows the joinder of counts in trespass and trover, if for the same cause of action.

Quere, whether if the original count were simply for trespass *qu. cl. fr.*, the new count in trover could be added? BENNETT, J.

The original declaration in this cause was entered at the June Term, 1857, of the Franklin county court, and was as follows:

"In a plea of trespass for that the defendant on the first day of April, 1857, with force and arms, at said Highgate, broke and entered the plaintiff's close" (describing it) "and then and there cut down and carried away one pine tree then standing and growing upon said close, to the value of fifty-six dollars, and converted the same to his own use, against the peace, and contrary to the force of the statute in such case made and provided, whereby, and by force of the statute in such case made and provided, the plaintiff is entitled to recover of the defendant treble the aforesaid value of said tree, amounting in the whole to the sum of one hundred sixty-eight dollars, all which is to the damage, &c., &c."

At the December Term, 1857, the plaintiff asked and obtained leave of the court to file additional counts in trover for the same cause of action, and at the following term filed a count in trover for one pine tree severed from the freehold. The defendant moved to dismiss this additional count, because it was not for the same cause of action, but the court overruled the motion, to which the defendant excepted.

W. W. White and L. E. Pelton, for the defendant.

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H. S. Royce, for the plaintiff.

BENNETT, J. The only question which it becomes necessary for this court to consider on this bill of exceptions is in relation to the decision of the county court on the motion of the defendant to dismiss the new count, filed at the December Term, 1857, in trover; and in disposing of this question, it is necessary in the first place to examine the count in the original declaration. The 32 sec. of chap. 104, page 550, of the Compiled Statutes, provides that *treble* damages may be recovered in an action founded on the statute against a person who shall cut down, destroy, or carry away any tree from the land of another, without leave or license from the owner, unless it was done through mistake, or he had good reason to suppose the land where the tree was cut was his own.

The court are all agreed that if the count in the original declaration is to be treated as a penal action founded upon this section of the statute, the amended count should have been dismissed, and a majority of the court think the count should be so considered. It is true, the commencement of the count is in the appropriate form of a declaration in trespass upon the freehold, yet this is well enough, especially upon the general issue, although the pleader intends to go upon the statute and claim treble damages. To give a right of action founded upon the statute, the trees cut down, destroyed, or carried away, must be standing, lying or growing on the land of the plaintiff, and the entry upon the lands of the plaintiff for such unlawful purpose necessarily constitutes a breaking of the plaintiff's close. The count there alleges the cutting down and carrying away the trees standing and growing upon the plaintiff's close of a given value, and then concludes "*against the peace and contrary to the statute in such case made and provided, whereby and by force of the statute in such case made and provided, the plaintiff is entitled to recover of the defendant treble the value of said tree, amounting in the whole to the sum of, &c.*" The statute in this declaration is counted upon by the pleader in the usual way, by an *express reference to it*, not only by declaring the transaction to be against the form of the statute in such case made and provided, but it proceeds to add, as a con-

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clusion this, to wit: "whereby and by force of the statute in such case made and provided 'the plaintiff is entitled to recover treble value of the tree,'" showing clearly that the pleader goes for the penalty. If the facts are stated which bring a case within a statute, this is what is called *pleading a statute*, although no mention or notice is taken of the statute; but counting upon a statute, as is done in this case, is by way of an express reference to it. It was not necessary in this case to recite the statute. Counting upon it was all that was necessary to entitle the party to the penalty.

The question now before us is not whether this declaration would be held good upon a demurrer as a declaration upon the statute, but how was this declaration justly treated by the pleader? and of this we think there can be little or no doubt. It is true, the transaction, to give *the penalty*, must be without the leave or license of the owner of the land; but this I apprehend is implied in the allegation, that the trespass was with force and arms and contrary to the force of the statute in such case made and provided; and if a license was in fact given to take the tree, the averment of it should, I apprehend, come from the other side. We think then it was not competent for the county court to allow account in trover to be filed by way of amendment either upon common law principles or under the recent statute in this State passed in 1856, which declares that counts in trespass and trespass on the case, including trover, may be joined in the same declaration, where both are for the same cause of action.

Treating the original count as being on the statute, and going for *treble damages*, it is clear the two counts cannot be for the same original cause of action, and for one I should not be prepared at this time to treat the count in trover as being for the same cause of action as the one disclosed in the first count, even if that was simply to be treated as a declaration for breaking and entering the plaintiff's close. The *gravamen* of the causes of action are not the same; one is local and the other is transitory. A different rule of damages might be adopted in the two cases and a different rule as to costs, and they would not be supported by the same proof; but it is not necessary to discuss this point, and much less to decide it.

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The result is, that we think the county court erred in not dismissing the amended count, and the judgment of the county court is reversed, and judgment rendered that the count in trover be dismissed, and the cause is remanded to the county court to be tried on the original count.

MARIAN WARD v. EBENEZER L. WHITNEY.*Usury. Principal and surety.*

Payments of usurious interest *eo nomine*, for the loan of money represented by a note, which in itself contains no usury, can be recovered back by the party making them, whether the note is paid in full or not; and the fact that such payments have been made by the principal will not avail the surety as a defence *pro tanto*, in an action on the note against him alone.

The right to recover such usurious payments, or to have them applied as payments upon, or offsets to the note, is confined to the party who has paid the usury.

ASSUMPSIT upon a promissory note. Plea, the general issue, and trial by jury, at the September Term, 1858, in Chittenden county,—BENNETT, J., presiding.

The note declared upon was a joint and several promissory note, signed by one Ayres as principal, and by one Ward and the defendant as sureties. The defendant introduced evidence tending to show that some years before the date of the note the plaintiff had loaned to Ayres a sum of money, and taken his individual note therefor; and that such note had been renewed from time to time by Ayres; and that at the date of the note declared upon, the plaintiff gave up to Ayres a note so taken of him, and took the note in suit therefor; that Ayres had, from time to time, after the lending of this money by the plaintiff to him, up to the date of the note in suit, paid upon this loan and upon the notes signed by him, interest at the rate of eight or ten per cent; that the defend-

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ant was surety for Ayres on the note in suit, and that he had not signed any of the other notes given to the plaintiff by Ayres; that no extra interest had been paid upon the note in suit and that none was included therein otherwise than by the payment of usurious interest by Ayres, as aforesaid, which usurious interest had not been deducted from the note in suit, or from either of the former notes given by Ayres alone.

The defendant insisted that if the jury should find that usurious interest had been paid by Ayres to the plaintiff, on the original loan on the notes for which the note in suit was given, to that extent it extinguished the debt; and that the jury should deduct the same, in their verdict, from the note in suit.

But the court decided otherwise, and directed a verdict for the plaintiff for the amount of the note and interest, to which the defendant excepted.

H. B. Smith and *George F. Edmunds*, for the defendant, cited *Ward v. Sharp*, 15 Vt. 115; *Smith v. Bromley*, Doug. 197; *Day v. Dunham*, 2 Johns. Chan. 182-191; *Blydenburgh on Usury* 106; *Fields v. Gorham*, 4 Day 254; *Bridge v. Hubbard*, 15 Mass. 96; *Warren v. Crabtree*, 1 Greenl. 167; *Huntress v. Patten*, 2 App. 28; *Dix v. Van Wyck*, 2 Hill 522; *Livingston v. Harris*, 11 Wend. 329; *Cole v. Savage*, 10 Paige 583; *Post v. Bank of Utica*, 7 Hill 391; *Gibson v. Stearns*, 3 N. H. 185; *Steele v. Franklin*, 5 N. H. 376; *Baggs v. Lendenbuck*, 12 Ohio 153; *Tuthill v. Davis*, 20 Johns. 285.

E. R. Hard and *J. French*, for the plaintiff, cited *Barker v. Esty & Tr.*, 19 Vt. 131; *Nichols v. Bellows*, 22 Vt. 581; *Bearce v. Barstow*, 9 Mass. 45; *Reading v. Weston*, 7 Conn. 409; *Knight v. Putnam*, 3 Pick. 184; *Little v. White*, 8 N. H. 276; *Grow v. Albee*, 19 Vt. 540; *Day v. Cummings*, 19 Vt. 496; *Hazard v. Smith*, 21 Vt. 128; *Nelson v. Cooley*, 20 Vt. 201; *Green v. Morse*, 4 Barb. 332; *Wescott v. Davis*, *Ib.*; *Little v. White*, 8 N. H. 276.

POLAND, J. As we understand the facts from the bill of exceptions in this case, Ayres obtained a loan of money from the plaintiff, and executed to her his note for the real amount received

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with legal interest, so that there was no usury included in the security, and the note was perfectly legal and valid in all respects. Ayres, by virtue of some parol contract or agreement, whether made at the time of the original contract for the loan, or subsequently, does not appear (nor does it appear to us, in the present state of the law, material how it was,) made payments to the plaintiff of usurious interest for delay of payment. These payments were made as payment of usurious interest *eo nomine*, and not upon the note itself, because no usurious interest was included in the note, but was paid upon a contract *outside* the security for the money. We think such payment by Ayres would have entitled him by the provisions of our statute and under our decisions, to have immediately commenced and sustained an action to recover back the usurious interest so paid. It is not important whether he gave a separate written security for the usurious interest, but the true distinction between the cases, as to whether the payment of usurious interest operates as a direct payment upon the note itself, is, whether the usurious interest is included in the note itself, or is paid upon a contract or agreement outside the note, either in writing or in parol.

After the note had run for some time, and had been renewed by Ayres, the note in suit was executed for the same debt, and the defendant and another person signed it as sureties for Ayres; but no usurious interest was included in it, nor has any been paid upon it. The defendant insists that as Ayres had paid usurious interest to the plaintiff upon the same loan, in law it should be regarded as a payment upon the note, and that therefore this note is to be regarded as including the amount Ayres had paid above the legal interest, or that so much of the debt was really extinguished, so that there was no legal consideration for this note to the same extent. But, as already stated, we think those payments are not to be regarded as payments on the note, because the sums paid were never included in the note, and that they did not in law extinguish any part of the legal debt; but that they created an independent legal ground of action in favor of Ayres against the plaintiff, which he could enforce by a suit against the plaintiff, whether the note itself had been paid or not. It is probably true that if the plaintiff had sued Ayres on the note he

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could have set up the payment of this usurious interest as a defence *pro tanto*, either as an offset or payment, and had it deducted from the note, for though the statute only declares that the party paying usurious interest may sue and recover it back, still, when sued by the party against whom he has such claim, he may, to avoid circuity of action, set it up by way of defence, to the extent of his right.

The defendant, then, when he signed the note to the plaintiff, entered into a contract that was perfectly binding and legal, and upon a full consideration, but his principal held an outstanding, independent claim against the plaintiff.

Now upon common principles, if this had been an ordinary legal debt in favor of Ayres against the plaintiff, the defendant, when sued alone, could not set it up by way of defence at law, because not between the same parties. If there were any special equities in the matter, arising from the insolvency of the principal, or other causes, he must enforce them by an application to a court of equity.

But the present case presents a further difficulty; the claim of Ayres for the usurious interest paid was in the nature of a penalty, "as for a tort," and by the statute is given or left to his personal choice or discretion, whether he will enforce it or not, and if he do not elect to do so, no other person, not even a surety, can set it up for him. The statute intended to leave the enforcement or waiver of such rights to stand upon the personal honor of the party. Under the old law in relation to usury, which made the security entirely void when there was an agreement for usurious interest at the time the loan was made, whether the usury was included in the security itself or in a separate one, or even when the agreement for the payment of usurious interest rested in parol, any party who was directly affected by the contract, either by privity of interest, estate, or representation, might avoid the contract by showing its unlawful character. The authorities relied on by the defendant mainly arose under that class of laws against usury, and have little if any effect upon the question involved here.

Whether Ayres, the principal, could himself have set up his claim against the plaintiff for usurious interest paid on the former

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notes, as a defence to that extent, it is not necessary now to decide, but we think the defendant cannot, for the reasons before stated.

It is said to be a great anomaly that the surety cannot avail himself of any and every defence that the principal could, if he were sued, and that it operates as a great hardship on the surety, and also on the principal, as he may be compelled to repay to the surety all that is collected of him. But this anomaly, if it be one, exists in every case where the principal's defence would be by setting up a counter claim in his own favor against the plaintiff, and with still more reason, when his claim is personal to himself and he only can enforce it. *

The surety is only made liable to perform the contract he entered into which was legal and valid, and he has his remedy over against the principal for all he is compelled to pay, and when it is paid by the principal he then has his remedy against the plaintiff to recover back the usurious interest he has paid, which is all the remedy given by statute in such a case.

We think these principles are all fully supported by the cases in this State cited in the argument, especially by *Barker v. Esty & Trustee*, 19 Vt. 131; *Nichols et al. v. Bellows*, 22 Vt. 581; and *Grow v. Albee*, 19 Vt. 540.

The judgment below is therefore affirmed.

SILVESTER CHURCHILL and LUCY CHURCHILL, his wife, v. MORTON COLE and LEVI UNDERWOOD.

(IN CHANCERY.)

Interest. Usury. Mortgage.

It seems that in the case of a note executed and delivered in this State, there being no evidence of any particular place of payment being agreed upon or understood by the parties, the law of this State as to interest will govern, notwithstanding the payee is a non-resident. POLAND, J.

C. borrowed \$1500 of the orator, and gave him his note for that amount, with interest, and secured the same by mortgage. He paid the orator seven per cent. interest upon the note for several years, and the annual endorsements

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of these payments showed the amount actually paid, and expressed them to be as and for each year's interest. In a petition for foreclosure of this mortgage against C. and a subsequent mortgagee, C. having without consideration released to the orator all claims for usurious interest paid by him, it was held that the subsequent mortgagee was not entitled to have the excess of such annual payments of interest over six per cent. applied in reduction of the amount due upon the note.

PETITION for the foreclosure of a mortgage of certain lands in Burlington, executed June 9th, 1843, by the defendant Cole to the oratrix, Lucy Churchill, to secure the payment of a promissory note for fifteen hundred dollars, dated at "Burlington, June 9th, 1843," and payable to the oratrix or order, in one year from date, with interest annually. The petition was brought at the September Term, 1858.

On the hearing before the master it appeared that the orator was, at the date of the note, an officer in the U. S. Army, and neither then was nor since had been a resident of this State; that the oratrix, who was the wife of the orator at the date of the note, was at that time transiently resident at Burlington, but since a year after that time had not resided in this State; that the consideration of the note was the loan to the defendant Cole by the oratrix of the sum of fifteen hundred dollars at the date of the note; that from that time until 1857, Cole had paid the oratrix seven per cent. interest upon the note, and that the same was endorsed thereon annually as follows:—"Received one hundred and five dollars interest on the within for one year to this date." These payments of interest and the endorsements were made without this State, Cole, however, residing here.

On the 9th of September, 1858, being the day of the service of the petition in this case upon him, the defendant Cole, without any consideration in fact, but for the expressed consideration of ten dollars, executed his release under seal to the orators of all claims he had against them for unlawful interest paid them upon the note in question.

The defendant, Underwood, claimed that the excess of each annual endorsement of interest over six per cent. upon the note should be treated as payments upon the note, and a decree rendered for the balance, but the chancellor held otherwise, and rendered a decree for the orators for the amount due upon the face

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of the note, treating the endorsements above named as the payment merely of the annual interest thereon, from which decree the defendant, Underwood, appealed.

Levi Underwood, pro se. with whom was *Asahel Peck*, cited *Ward v. Sharp*, 15 Vt. 115; 1 Hilliard on Mortgages, 379; *Marshfield v. Ogle*, 31 Eng. L. & Eq. 357; *Hazard v. Smith*, 21 Vt. 123; *Blydenburgh on Usury*, 106; *Jackson v. Dominick*, 14 Johns. 435; *Bush v. Avery*, 4 Comst. 225; *Lloyd v. Scott*, 4 Peters 205; *Day v. Dunham*, 2 Johns. Chan. 182; *Pearsall v. Kingsland*, 3 Edwards Chan. 195; *Post v. Dart*, 8 Paige 639; *Shufelt v. Shufelt*, 9 Paige 137; *Cruther v. Trabue*, 5 Dana 82; *Day v. Cumming*, 19 Vt. 496; *Lowell v. Johnson*, 2 Shepley 240; *Miller v. Hall*, 4 Denio 104.

George F. Edmunds, for the orators.

POLAND, J. I. We have spent no time in the examination of the ground taken by the orators' counsel, that the legal rate of interest on the note executed by Cole to the orators was not fixed and governed by the law of this State, in consequence of the orators being non-residents of the State at the date of the note and ever since. As the note was executed and delivered here, and payable generally, and no evidence in the case that any particular place of payment was understood or agreed upon between the parties, it would seem to us pretty difficult to maintain that the contract for interest must not be governed by the law of the *lex loci contractus*. But we do not find it necessary to decide any thing on this point.

II. Is the defendant, Underwood, entitled to have what the defendant, Cole, has paid the orators on the mortgage note above the legal rate of six per cent. interest, deducted in making up the decree, upon the facts appearing on the report of the master?

The questions arising upon this part of the case have been to a considerable extent before the court at the present term, in the case of *Ward v. Whitney*,* so that little need be added to what has been already said in that case.

The note of Cole to Mrs. Churchill was given only for the

* See ante. page 89.

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sum actually loaned to Cole, and legal interest, so that any agreement for the payment of usurious interest was separate and distinct from the note, and the payment of it would not in law be a payment upon the note itself, as it would be if included within the note. But the defendant, Underwood, claims that as the endorsements of the annual interest on the note show the actual amount paid, and that the amount was more than the lawful interest, this legally effects an application to the principal of the note to that extent. But we think that the whole language of the endorsement must be taken together to show the intent of the parties as to the application of the money paid. That clearly shows that the money paid was paid *as interest*, and that the parties as between themselves never intended it to apply upon or extinguish any part of the principal of the note. The sum paid, being stated, furnishes ample evidence of the amount paid by Cole and received by the orators, but it proves it to have been paid as *seven per cent. interest*, and not in extinguishment of any part of the note. The open and undisguised manner in which the endorsements of the interest were made, show that there was no apprehension by the orators that they were taking unlawful interest, but probably this is of no legal importance. In our judgment the legal effect of these endorsements, made in the manner and with the intent apparent upon their face, is the same as if receipts had been given in the same words by the orators to Cole, or the legal interest only had been endorsed, and the payment of the excess proved by any legal evidence.

The conclusion is that the note remained a valid, legal security for the amount of the principal, against Cole, and he had such a right as the statute gives to a party paying usurious interest to recover it back by suit, or to set it up when sued by the creditor as a defence to that extent in reduction of the debt.

The defendant, Underwood, claims that he being a subsequent mortgagee of the premises from Cole, had such a privity of estate with Cole, that he has the same right to set up usury in the prior mortgage debt that Cole himself would have, and cites many authorities to show that such is his legal right. Under the former law in this State on the subject of usury, (which is still the law in many of the States,) by which the

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security itself was void if the contract was tainted with usury, the defence could not only be made by the debtor in the usurious contract, but by any one who was privy to him in estate or by contract or representation. Under that state of the law, undoubtedly a subsequent mortgagee might set up as a defence to a prior incumbrance, (the payment of which he had not assumed,) that it was usurious and void. All or nearly all the cases cited by the defence are cases of this character, and arose under similar usury laws.

But our present law is totally different. The security is not affected, but the right is given to the party paying the usury to recall it at his option.

This is regarded as a right purely personal in the debtor, and though the statute gives him an action in form in assumpsit, still it is given as a penalty, and as for a tort. It does not pass to his assignee, if he becomes bankrupt or insolvent, and cannot be attached by his creditors by trustee process. In short, the statute intended that he only should enforce it, or those standing in the same legal right with him, by his assent. The result is that Cole could release or refuse to enforce this penalty if he chose to do so, and having elected to release and discharge it, we think the defendant Underwood cannot make it available to his defence. The result is that the chancellor's decree is affirmed, and the case is remanded to be perfected in the court of chancery.

JOHN HACKETT v. BENJAMIN CALLENDER, EMERSON R. WRIGHT
AND ROYAL FLINT, *and the Administrators of the Estate of*
JOHN HACKETT, SENIOR, *deceased.*

(IN CHANCERY.)

Chancery. Reasonable inquiry. Execution. Notice.

H. purchased and paid for land of which he took and kept the open and pub. lic possession, but the deed was taken in the name of F. E., an attorney, having demands against H. in his hands for collection, inquired of the latter

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if he owned the land, and he replied in the negative. Subsequently E., having received a demand against F. for collection, and desiring to secure it by an attachment of the same land, inquired of H. if he owned it, and received the same reply, but he did not disclose to H. his purpose in making the inquiry, and intended not to do so. E. then caused the land to be attached and levied upon as the property of F.; *Held*, that the possession of the land by H. was sufficient notice of his equitable interest therein to put the creditors of F. upon inquiry before attaching it; and that under the circumstances, the last inquiry by E. of H., in regard to the title of the land, was not properly made, and that H.'s answer did not rebut the presumption of notice of his equitable interest raised by his possession of the land.

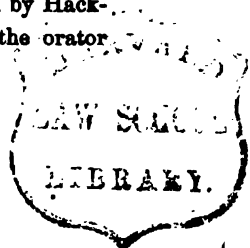
When a person is inquired of as to a matter in respect to which his answer may affect his pecuniary interests, he has a right to know whether the person making the inquiry has an interest which entitles him to make it, and what the object of the inquiry is, and that his answer will be relied upon. Unless correctly informed upon these points his answers will not affect his legal rights or pecuniary interests.

If an attaching creditor has notice after his attachment but before levy, that the land attached does not belong to the debtor but to another person, though the record title is in the debtor, such notice, if true, will be sufficient to protect the equitable interest of the real owner against the levy.

The bill set forth that on the 2d of January, 1849, the orator purchased of the administrator of the estate of one I. W. Cushman certain lands in Middlebury, and paid for the same; that the orator's father, John Hackett, senior, and Royal Flint assisted the orator in raising a portion of the money to pay for such purchase, by signing with him, as his sureties, a note payable to one Darling, and another note payable to the Bank of Middlebury; that for the purpose of securing his father and Flint for becoming his sureties upon these notes he caused the deed of the land to be executed to them instead of to himself, under the agreement that the land should be held by them in the first instance as such security, and secondly in trust for the orator, and that they should convey the land to him upon his paying the notes signed by them as sureties; that the deed of said land to Flint and Hackett, senior, was duly recorded; that the orator entered into possession of the land at the date of that deed, and had ever since continued in possession thereof, had paid all the taxes thereon, and made improvements upon the same; that the orator had paid the note to the Bank of Middlebury, and was ready and willing to pay the note to Darling, as soon as the administrators of Hackett,

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senior, would execute to the orator a deed of their intestate's interest in said land; that Flint, on the 15th of January, 1852, quitclaimed all his title and interest in said land to your orator, by a deed of that date duly acknowledged and recorded; that the defendant Callender, by the defendant Wright, as his attorney, on the 5th of January, 1852, commenced a suit in his favor, upon a pre-existing debt, against Flint, who was then insolvent, and therein attached all the land in Middlebury as Flint's property, in which suit he recovered judgment against Flint at the December Term, 1852, of the Addison county court, upon which an execution was issued, which, on the 21st of March, 1853, was levied upon a fractional portion of an undivided half of said land; that the defendant Wright, having in his hands, as attorney for Callender, another claim in favor of the latter against Flint, brought a suit thereon in his own name against Flint, on the 5th of January, 1852, returnable before a justice of the peace, and therein also attached all the land in Middlebury as the property of Flint; that judgment was rendered on the 19th of March, 1852, in this suit in favor of Wright against Flint, and an execution was issued thereon, which, on the 21st of March, 1853, was also levied upon a fractional portion of an undivided half of said land; that Callender commenced an action of ejectment against the orator on the 1st of December, 1853, to recover the land on which his execution was levied as aforesaid, which action was pending when the bill in this case was brought; that Wright* had also commenced an action of ejectment against the orator to recover the land included in his levy, which was also pending, and that the orator was in danger of losing the title to his land by the judgment of the court of law in which these actions of ejectment were pending, for the reason that the record title of said land was in Flint and Hackett, senior, as aforesaid; that both of said judgments and levies belonged in fact to the defendant Callender, and that both of said actions of ejectment were brought in his behalf and for his benefit; and that before the commencement of the said suits against Flint in favor of Callender and Wright, the latter had notice that the land in question was held by Hackett, senior, and Flint in trust for the orator, and that the orator claimed it as his own.



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The bill prayed for a decree that Callender and Wright should be enjoined from prosecuting their actions of ejectment for the land in question, and should release to the orator all claim to the land embraced in their levies; that Flint and the administrators of Hackett, senior, should convey to the orator the said land upon the payment by the orator of the note held by Darling, and for further relief, etc.

From the answers of the defendants and the testimony in the case, it appeared that all the allegations in the bill were sustained except that Wright in his testimony denied any notice to him, previous to the commencement of the suits against Flint, that Flint and Hackett, senior, held the title to the land in question merely in trust for the orator.

The material portion of Wright's testimony was that in May, 1849, having certain demands in his hands for collection against the orator, the latter informed him that he had no interest in the land in question; that in January, 1850, in a conversation with the orator about certain claims against him, the latter repeated that he did not own the lands in controversy; that in 1852, and a few days before the attachments of the land were made in the suits against Flint, Wright, having the Callender demands in his hands for collection, inquired of the orator if he had any claim or title to the land deeded by the administrator of Cushman to Hackett, senior, and Flint, and that the orator replied that he had not, and that if Wright did not believe it he could go to the town clerk's office, or the administrator of Cushman, and ascertain the fact; and that at that time Wright was aware that the orator was occupying the premises in question.

On cross-examination Wright testified that in this last conversation with the orator he did not give him to understand that he held any demands against Flint, and that he made no disclosures to him of his purpose in making the inquiry in regard to the ownership of the land, and that it was his object not to make any. It appeared that at the time of the two first conversations about the land between Wright and the orator, the former did not have the Callender demands against Flint in his hands for collection. It also appeared that the copies of the writs of *Callender v. Flint* and *Wright v. Flint*, were not delivered to Flint until the 15th of

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January, 1852, and that on that day Flint notified Wright that he had no interest whatever in the land in question, except for the purpose of security for signing the Darling note for the orator. It also appeared that the Darling note had been paid by the administrators of the estate of John Hackett, senior.

The Chancellor, BENNETT, J., at the December Term, 1858, in Addison county, dismissed the bill as to Wright and Callender, with costs, and decreed that upon the payment by the orator to the administrators of the estate of John Hackett, senior, of the amount due from him to that estate within ninety days, the said administrators should deliver to the orator a quitclaim deed of the land in question from the heirs of John Hackett, senior, to the orator, excepting such portions of the land as were embraced in the Callender and Wright levies; and that they should recover costs of the orator.

From this decree the orator appealed.

Linsley & Prout and E. J. Phelps, for the orator.

I. There was sufficient notice of the trust in favor of the orator to exempt the property from attachment on the debts of the trustee.

1. The possession of the orator was of itself sufficient notice. Especially in connection with the acts of ownership on his part, and the absence of any claim or interference by those who held the title; *Pinney v. Fellows*, 15 Vt. 325, and cases there cited.

2. Flint gave actual notice to Wright before the attachments were completed that the property belonged to the orator.

3. Before any judgment or levy under the attachments, Flint conveyed to the orator.

In view of all these facts it cannot be doubted *and is not denied*, that Wright knew that the land did not belong to Flint.

II. The orator is not estopped by what he is claimed to have said to Wright, from showing the truth in regard to the title to the land.

1. We deny that the testimony of Wright, himself a defendant and the attorney of the other defendant, is sufficient to prove these statements. The conversation took place under circumstances that strongly discredit the witness. The clearest proof should be required before a party should be held estopped. Evidence in

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regard to admissions, obtained in casual conversation, by an interested witness seeking to make testimony against a person unsuspecting of his object, is the least reliable of any that is ever heard in a court of justice, and the very last that ought to be held sufficient to estop a party from showing what is conceded to be the truth.

It will be observed that an addition of only a word or two by way of strengthening, makes the entire difference between what the orator is claimed to have said on this occasion and the strict truth.

2. The orator was not made aware that his statement to Wright was in any way to be acted on, nor for what purpose, nor in whose behalf the inquiry was made. On the contrary, the object of the conversation was sedulously concealed, and he was led to believe that it had reference to a different subject, and different parties.

We deny that a statement so obtained and so made, was ever held to estop a party from proving the contrary. It is the very essence of an estoppel of this character, that the statement relied on is made in order to induce an innocent party to act on it to his detriment, or at least with knowledge that it will be so acted on. In such case the statement becomes an intentional fraud, and the party making it must abide the consequences. But nothing short of this will ever operate as an estoppel; 2 Smith's Lead. Cases, 564; *Laxell v. Odle*, 8 Hill 215; *Whitaker v. Williams*, 20 Conn. 98; *Steele v. Putney*, 8 Shepley, 327; *Hicks v. Craw*, 17 Vt. 374; *Strong v. Ellsworth*, 26 Vt. 374.

The rule contended for by the defendants necessarily goes the length of holding every untrue statement, under whatever circumstances made, a perpetual estoppel thenceforth upon the party making it, from ever proving the truth of the matter in a court of justice, however or with whomsoever the question may arise.

8. The defendants have lost nothing by the orator's alleged statement, and are therefore not authorized to claim it as an estoppel. The principle only extends in favor of those who would suffer by such a false statement if the party were afterward permitted to retract and contradict it.

The debts against Flint were old and worthless. The attachments were not made in consequence of the orator's statement, but the statement was ingeniously obtained (if at all) in aid of the proposed attachments. If they finally prove unavailable, the

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defendants have lost nothing whatever by the experiment. It is not pretended that they could meanwhile have secured their debts in any other way. A mere fruitless attachment, without other detriment, is not sufficient to entitle the defendants to claim an estoppel; *Pinney v. Fellows*, above cited.

L. E. Chittenden, J. W. Stewart and E. R. Wright, for the defendants Callender and Wright.

I. The title to an undivided moiety of the premises in question, at the time of the attachment, stood upon the record in the name of Flint, the execution debtor. It was attached by the creditor without any notice of the orator's equity, (if he has any equity.) The case must be determined upon the facts as they stood at the time of the attachment, for it is then that the lien of the execution creditor commences and is acquired. Subsequent notice of an equitable title cannot affect him; *Carter v. Champion*, 8 Conn. 549; *Stanley v. Perley et al.*, 5 Maine 369; *Kent et al. v. Plummer*, 7 Maine 464; *Emerson v. Litchfield*, 12 Maine 148; *Slocum v. Catlin et al.*, 22 Vt. 137.

The onus is then thrown on the orator of showing such facts as will protect the premises from attachment as the property of Flint. He can only do this by showing notice of his equitable interest to the creditor before the attachment, or what is in law equivalent thereto.

1. He has shown no such notice.

2. The only fact upon which he can rely which shall have the effect of notice is his possession of the premises at the time of the attachment.

This fact may amount to implied notice that the orator was rightfully the possessor; *Rublee v. Mead*, 2 Vt. 544; *Green et al. v. Slater et al.*, 4 Johns. Ch. 46.

It is no notice whatever of the extent of the orator's title. It is only available to put the attaching creditor upon inquiry after the title or right of the orator, that upon such inquiry its extent may be ascertained; *Pope v. Henry*, 24 Vt. 565; *Rogers v. Jones*, 8 N. H. 264; *Pinney v. Fellows*, 15 Vt. 541; *Crofton v. Ormsby*, 2 Sholes & Sepoy 599.

The fact of possession admits of other explanation than the

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prima facie one of ownership. The possession of the orator in this case might have well been *under* Flint, as tenant or otherwise. If therefore the party in possession, upon inquiry by a creditor about to attach, *denies* his interest in the premises, and asserts the ownership to be where the record evidence leaves it, the possession is *explained*. It ceases to be notice, and the creditor may go by the record; *Rogers v. Jones, supra*.

In this case the orator (being in possession) is asked whether he has any interest in the premises, and he disclaims ownership, referring the agent of the execution creditor to the *record* for the state of the title; the place to which he would be referred by the law. If the orator is not technically *estopped* by these acts, at least, the effect of his express disclaimer must be to overcome the implied notice of his possession.

The defendant, as an attaching creditor, stands on the same footing as a purchaser; *Carter v. Champion, supra*; *Bigelow v. Topliff*, 25 Vt. 273; *Burnell v. Robertson*, 5 Gilman 282; 10 U. S. Dig., 54 sec. 41.

Parties standing otherwise equal, the legal shall prevail over the equitable estate. The orator's claim rests upon a supposed fraud in the defendant in undertaking, with knowledge of the facts, to defeat his equitable title; *Pomroy v. Stevens*, 11 Met. 244; *Spofford v. Weston*, 29 Maine 140.

The defendant was bound to inquire; he did inquire. He acted according to the information received, and this is the fraud!

E. N. Briggs, for the administrators of the estate of John Hackett, senior.

ALDIS, J. The evidence shows that the legal estate and record title to the premises in question were vested in Royal Flint and John Hackett, sen., but that John Hackett, jun., the orator, was the real owner. About the time that the orator bought the land and had it conveyed to Flint and his father, which was in January, 1849, he went into possession of it and so remained in possession, exercising acts of ownership, up to the time that the defendants Callender and Wright attached the land as the property of Royal Flint. They attached the land by leaving a copy in the town clerk's office on the 5th of January, 1852, and on the 15th of

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January they completed their attachments by serving a copy on Flint. Thus at the time of the attachments Royal Flint appeared of record as the owner of half of the land, while the orator was in possession and was the equitable owner of the whole. Wright and Callender obtained judgments in their suits against Flint, and on the 21st of March, 1853, levied their executions upon one-half of the land as the property of Flint.

As the orator was in possession before and at the time of the attachment, his possession was so far, at least, notice to Wright and Callender of his equitable interest, as to put them on inquiry. They claim to have made all such inquiry of him as to his rights and title in the land as the law requires; and that in reply to such inquiry the orator stated that he had no claim to the premises whatever, but that they belonged to his father and the said Royal Flint; and that the defendants Wright and Callender, relying on this assurance of the orator, and without any notice of his equitable interest, made their attachments. They claim that their attachments so made are valid and binding to hold the land as the property of Flint.

The orator claims that the inquiry was not properly made of him; that the purpose and object of the defendants in making the inquiry was concealed; and that the answers were either so obtained by artifice, or given by the orator in heedlessness, ignorance, or by being misled, that they should not be held to rebut the evidence of notice arising from his possession, or be regarded as a binding denial by him of his equitable interest.

Upon these conflicting claims of the orator and the defendants the first question in the case arises.

When a person is put upon inquiry it is his duty to pursue the inquiry with reasonable diligence, and an honest desire to ascertain the real truth. He should do nothing to avoid the truth. He should not omit or conceal anything so that the party inquired of may be thereby misled, or may have his attention directed to some object or interest which might tempt him to conceal the truth or to speak a falsehood. To so mislead the party, or, consciously to allow him to be so misled to the statement of a falsehood, would be an artifice, which should deprive the inquirer of any benefit from the information so obtained.

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When a person is inquired of as to a matter in which his answer may affect his pecuniary interests, he has a right to know whether the person making the inquiry has an interest which entitles him to make it, and what the object of the inquiry is, and that the answer will be relied upon. When he fairly and fully understands that the inquiry is entitled to a truthful reply, and that the reply may be acted upon, then he is bound to answer according to the truth; and if he answer falsely or inaccurately it is at his peril.

But when he is not apprised of the rights and objects of the party inquiring, when he may think that mere inquisitiveness or idle or impertinent curiosity prompt the question, then his answers ought not to be held to affect his legal rights or pecuniary interests.

Idle or impertinent questions relative to one's private affairs, often fail to receive either respectful attention or accurate reply. Men who are honest and truthful either do not answer them at all, or else answer so as rather to get rid of the inquirer than to furnish accurate information. Some perhaps, acting upon a more questionable theory in morals, that one is not bound to speak the truth where the other has no right to ask the question or to expect an answer, according to truth, would not hesitate to reply with a falsehood. Between such idle questions and reasonable inquiries springing from the necessities of business and directed to proper objects, there is a wide difference.

Hence, when one is put upon inquiry it is his duty to see to it that the person inquired of fairly understands that the inquirer has a right to put the question, and what the object of it is, and that the information sought for will be relied upon, and that he may not be led to suppose that it is an idle, impertinent or casual question, in answering which he is not bound to accuracy and truth. Fair dealing, we think, requires that these principles should be observed.

In applying them to this case we must rely wholly on the testimony of Mr. Wright.

It appears that some time previous to the making of the attachments, Mr. Wright had demands against the orator left with him for collection. Upon two occasions, in 1849 and December, 1850, having debts against Hackett to secure, he inquired of the

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orator as to his interest in or title to this land, and was informed, substantially, that it belonged to Flint and Hackett, senior. About a year after the last of these conversations, and a few days before the attachments, Wright, desiring to collect debts against Flint, who had failed, again inquired of the orator if he had any claim or title to the land. On cross examination he says he did not give Hackett to understand that he held any demand against Flint; that he made no disclosure whatever to Hackett, and that it was his object not to make any. From this statement of Wright's it is plain that Hackett could not have known what was the purpose of the inquiry, or that Wright had any reasonable cause for making it, or would rely or act upon the answer he might obtain. Indeed, he might very naturally recur to his former conversations with Wright, and suppose that he made the inquiry for the purpose of finding out whether he could not attach it on a debt against himself. Mr. Wright might have foreseen, if his attention had been called to the matter, that Hackett would recur to the former conversations with him, and that he would be likely to give the same answer as before, unless the object of making the inquiry, viz, that he wished to secure a debt against Flint, was communicated to him. And in connection with these circumstances we are to bear in mind that Mr. Wright purposely concealed from him his object in making the inquiry. The concealment of his purpose by Wright, though not intended as an artifice to entrap Hackett into a false admission, had the effect of making him heedless as to his reply. We think the manner in which this inquiry was pursued falls much below the reasonable requirements of the law.

Mr. Wright knew the record title was in Flint, and the possession in Hackett, and that he was bound to inquire as to the meaning of such possession, and whether Flint was the real owner. If he had told Hackett "I have a debt against Flint which I wish to secure, and I wish to know whether you have any interest in this land of which you are in possession, or whether it really belongs to Flint, as it appears of record," we think he would then have so conducted the inquiry as to bind Hackett by his answers. But as the case stands, we think the answer of Hackett does not rebut the presumption of notice which

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the law raises from his possession ; that it is the same as if no inquiry whatever had been made by the defendants.

Another point has been made and argued, and upon which, as the court all concur, we deem it proper to express our decision.

After the attachment and before the levy of the defendants' executions, the defendants were notified of the equitable title and interest of the orator. The debt of the defendants against Flint does not appear to have been contracted by Callender relying upon Flint's ownership of the land. The question is therefore raised that Callender, as an attaching creditor, does not, by virtue of his attaching the land, (even if he then had no notice of the trust) acquire a lien like that of a subsequent purchaser without notice, but that his lien by attachment was defeated by the actual notice which he received before the levy.

In the opinion of Judge ISHAM in *Bigelow & Wife v. Topliff*, 25 Vt. 273, it is said that the lien of attaching creditors has always been considered in this State as creating an equitable title equal to that of purchasers. We are not aware that that question has ever been decided in this State, and the expression in the opinion alluded to does not seem to have been called for by a decision of that case.

There is an obvious difference in the equities of a subsequent bona fide purchaser of land without notice of a trust, and of a creditor who attaches to secure an antecedent debt. The purchaser advances his money to buy the land. He gives a new consideration. He parts with a new value upon the credit of the apparent record title.

The attaching creditor merely seeks to secure an old debt. He advances nothing upon the strength of the record title. He is not made worse by relying upon it. The omission of the real owner to record his deed has not injured the creditor or been the means of depriving him of any value. It is for these reasons that courts generally have treated them as standing upon equities materially different. The cases cited show that a different doctrine has been held in Connecticut and Maine. The case of *Carter v. Champion*, 8 Conn. 549, is the leading authority to the contrary. But the court turn the case upon the reason that the creditor might select and attach property of the debtor when the secu-

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urity was ample, and afterwards by notice be deprived of his security when it had become too late to obtain any other.

We think the supposition of such a case ought not to be the guide in establishing the general rule, and that practically such a case would be the exception rather than the rule. If such a case were to arise the creditor would stand upon an equity similar to that of a subsequent purchaser. He could say that by relying on the record title he had been deprived of obtaining security for his debt. So if a creditor, relying on his attachment and the record, had surrendered other securities, he might have a superior equity. But the case at bar shows no such or similar equity. It is merely the case of an attaching creditor attempting to secure an old debt against an insolvent debtor by attachment. No new value, credit or consideration are shown, no securities lost, endangered or surrendered.

Analogous decisions sustain this distinction. When goods are obtained by false pretences, the subsequent purchaser, without notice, obtains a good title to them. Not so the attaching creditor. He gets nothing by his attachment. He stands in the shoes of his debtor. This is settled by many decisions and is recognized in *Poor v. Woodburn et al.*, 25 Vt. 234. So in the case of purchasers, the rule is well settled in England and has been generally adopted in this country, that notice of the trust before the actual payment of the money, although it be secured and the conveyance executed, is equivalent to notice before the contract, and precludes the purchaser from paying the money and perfecting the purchase. The principle upon which this doctrine rests is to protect the interest of the *cestuis que trust* when it does not injure the purchaser. When the purchaser has paid his money and bought the legal title, he has at least an equal equity with the *cestuis que trust*, and having the legal title also, his title and equity united give him precedence. But the attaching creditor upon an antecedent debt has neither the equity nor the legal title, and notice to him of the trust before he gets the legal title by levy and so discharges his debt, should put an end to his lien as between him and the real owner.

The decree of the chancellor is reversed, and the case remanded to the court of chancery with instructions that a decree be made

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to perpetually enjoin Callender and Wright from further prosecuting the actions of law mentioned in the bill, and that the orator recover his costs against Callender and Wright; and as to Darling and Cushman, administrators of John Hackett, senior, that the decree of the chancellor be affirmed with costs, except that the time of payment by Hackett, junior, to them of the amount due the estate of John Hackett, senior, be extended to ninety days from the making of the final decree by the chancellor.

BENJAMIN F. GAYLORD v. JOHN SORAGEN.

Illegal contract. Intoxicating liquors.

Mere knowledge by the vendor of goods sold in another State that the vendee intends to use them in violation of the laws of this State, is not sufficient to invalidate the contract, when sought to be enforced here. But if the vendor do anything, with such knowledge, beyond the sale of the goods, in aid of the illegal design of the vendee, he cannot maintain an action upon his contract in the courts of this State.

The plaintiff, being authorized to sell intoxicating liquors in the State of New York, sold some there to the defendant who resided here, and who intended to use them in this State contrary to law, and this illegal intent was known to the plaintiff. The liquors were delivered in New York to a carrier, designated by the defendant, to be transported to Vermont at the latter's risk. But at the defendant's request, and for the purpose of preventing the seizure of the liquor for a violation of our laws, the plaintiff marked the casks in a peculiar way, omitting the defendant's name. *Held*, that the plaintiff had so far participated in the defendant's illegal design that he could not recover the price of the liquor in the courts of this State.

ASSUMPSIT for the price of a quantity of liquor sold by the plaintiff to the defendant. Plea, the general issue and trial by jury at the September Term, 1858, in Chittenden county, BENNETT, J. presiding.

It appeared on trial that in January, 1857, the defendant, who resided and did his business at Burlington, in this State, purchased at Plattsburgh, New York, of the plaintiff, who dealt in liquors and resided in Plattsburgh, a quantity of intoxicating

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liquors, which he directed the plaintiff to put up and forward to him at Burlington; and also requested him when he forwarded the liquor to put no other marks on the casks than a diamond mark with the letter S in it, and the testimony tended to prove that the purpose of having the casks so marked was to prevent their seizure by the officers in this State, for a violation of its laws, and that it was so understood by both parties at the time.

It further appeared that the plaintiff did put up and forward the liquor to the defendant as requested, and that it was marked as requested, and that it was delivered by the plaintiff to the persons designated by the defendant as carriers, in the State of New York, and was forwarded to the defendant at Burlington by them at his expense and risk, and that this was according to the arrangement made between the parties when the defendant purchased the liquors at Plattsburgh. It further appeared that this sale was valid by the laws of New York and that the plaintiff had the right to make it unless inhibited by the act passed by the legislature of that State in 1855, which is referred to in the case of *Wynehamer v. The People*, 3 Kernan 378. The witness on this point was a counsellor of law of the State of New York, who testified that the act of 1855 had been declared unconstitutional and void by the court of appeals of that State, but he based his evidence entirely on the reported case above mentioned. And the testimony tended to prove that the plaintiff, when he sold the liquors to the defendant, knew that the latter intended to sell them here in violation of the laws of Vermont.

On this evidence the defendant requested the court to charge the jury first, that although the courts in New York had declared, as it appears from the above reported case, certain portions of the act of 1855, unconstitutional and void, yet that the whole act was not void, and that by the 16th section of said act* the plaintiff could not recover in this case; and secondly, that if the jury found that the plaintiff did, at the defendant's request, mark the

* which provides that "no person shall maintain an action to recover the value or possession of any intoxicating liquors sold or kept by him which shall be purchased, taken, detained or injured by any other person, unless he shall prove that such liquor was sold according to the provisions of this act, or was lawfully kept or owned by him, &c.

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casks in the manner above stated, for the purpose of enabling the defendant with more facility to prevent the seizure of the liquors under the laws of Vermont, the plaintiff was not entitled to recover.

The court refused to charge as requested, and directed a verdict for the plaintiff for the price of the liquor, to which the defendant excepted.

J. Maeck, for the defendant, cited Story's Conf. Laws, sec. 244, 251-5; *Lightfoot v. Tenant*, 1 Bos. & Pul. 451; *Langton v. Hughes*, 1 Maule & Sel. 593; *Waymell v. Reed*, 5 Term 594; *Biggs v. Lawrence*, 3 Term 459; *Clugas v. Penaluna*, 4 Term 466; *Territt v. Bartlett*, 21 Vt. 188; *Pellicat v. Angell*, 2 Crompt. Mees. & Ros. 311.

W. G. Shaw, for the plaintiff.

ALDIS, J. I. We think the decision of the court of appeals, reported in 3 Kernan 378, establishes the unconstitutionality of the 16th section of the act of the State of New York passed in 1855, for the prevention of intemperance. That section is obnoxious to the objections which were sufficient to induce the court to declare the act in other sections unconstitutional. The contract between the plaintiff and the defendant was, therefore, valid by the laws of New York.

II. Mere knowledge by the vendor of goods selling them in a foreign State, that the vendee intends to use them in violation of the laws of this State, is not sufficient to invalidate the contract, when it is sought to be enforced in our courts. Our own courts have recognized this rule; *McConihe v. McMann*, 27 Vt. 95. And it is now generally adopted in this country and in England, though the contrary doctrine has received the support of some eminent judges and jurists.

III. Although mere knowledge of the unlawful intent of the vendee by the vendor will not bar him from enforcing his contract to recover for the goods in our courts, yet it is well settled that if he in any way aid the vendee in his unlawful design to violate our laws, such participation in the illegal enterprise will

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disqualify him from maintaining an action on his contract in this State. The participation by the vendor must be active to some extent; he must do something, though indirectly, in furtherance of the vendees design to violate our laws. Mere omission to act is not enough, but positive acts in aid of the unlawful purpose, however slight, are sufficient.

In the case at bar, the defendant bought the liquors of the plaintiff at Plattsburgh, the plaintiff knowing that the defendant intended to bring them to Burlington and sell them in violation of our laws. It was understood by both parties that if the casks were marked with the defendant's name they would be in danger of being seized by our officers as soon as they arrived on this side of the lake. To prevent seizure by our officers the plaintiff, at the defendant's request, omitted to mark them with the defendant's name, and did mark them with a private mark, known to the defendant—a diamond with the letter S in it. Both parties understood that the object of so marking the casks was to enable the defendant with greater facility to save them from seizure.

Now this omission to mark them with the defendant's name, standing alone, would not, in our judgment, be an act of participation sufficient to bar the plaintiff. But the plaintiff went further, and the act done, though slight, is significant. He so marked them that the defendant might instantly know his casks on their arrival, and so be enabled to remove them before the officers of the State should have their suspicions awakened. This act, though so slight, gave the defendant an advantage over the officers and aided him in escaping from their vigilance. This was the object the plaintiff and the defendant intended to accomplish by having them so marked. We think the act done tended to secure their design.

If the plaintiff had put some false mark on the casks for the purpose of disguising their true character and of deceiving the public authorities, no one could doubt for a moment that that would be active participation in the unlawful purpose. The marks actually used tended to the same object, though not used for the purpose of deceiving the officers, but only of enabling the defendant with facility to escape their observation.

As the evidence tended to prove that the plaintiff, by his acts,

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done in connection with the sale and delivery of the liquor, aided the defendant to escape the vigilance of the officers and so to have and to sell the liquors in violation of our laws, it should have been admitted. The refusal to allow it to go to the jury was error. Judgment reversed.

PETER LANDER, JR. v. A. B. SEAYER.

Authority of school teachers to punish their scholars. Evidence.

Though a schoolmaster has in general no right to punish a pupil for misconduct committed after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and to subvert the master's authority.

A schoolmaster is not relieved from liability in damages for the punishment of a scholar which is *clearly* excessive and unnecessary, by the fact that he acted in good faith and without malice, honestly thinking that the punishment was necessary both for the discipline of the school and the welfare of the scholar.

But if there is any reasonable doubt that the punishment was excessive, the master should have the benefit of it.

Upon the question whether the punishment of a pupil by his master was excessive or not, evidence that the ordinary management of the latter as a teacher was mild and moderate is not admissible.

It *seems*, however, that such evidence would be admissible in regard to the question whether the punishment was wanton and malicious.

Whether a rawhide is a proper instrument of punishment of a pupil by his master is for the jury to decide, in consideration of all the circumstances of the case.

Upon the question whether a school teacher acted maliciously in the punishment of a scholar, it is competent for the former to show that in other schools in the vicinity the same instrument of punishment is used as that resorted to by him.

In trespass against a schoolmaster for the punishment of a scholar on account of misconduct out of school, it was held that it was competent evidence

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against the charge that the punishment was excessive, to show that at a former trial of the same case, no claim of that kind was made, but that the plaintiff then only claimed that the master had no right to punish for such misconduct.

TRESPASS for assault and battery. Plea the general issue and two special pleas in bar. The first special plea alleged that the defendant was a schoolmaster, and the plaintiff was one of his pupils, and was guilty of misbehavior as such pupil, for the purpose of punishing which the defendant did, in his school, a little beat and bruise the plaintiff, doing him no unnecessary injury, which was alleged to be the same trespass complained of in the declaration.

The second special plea justified the alleged trespass upon the same ground, except that the offence for which the plaintiff was alleged to have been punished, was stated to have been the use of saucy and disrespectful language towards the defendant, after the close of the school, but in the presence of other pupils of the defendant, such language tending to degrade the latter in the opinion of such other pupils.

The plaintiff replied *de injuria*, &c., and the case was tried by jury at the September Term, 1858, in Chittenden county, BENNETT, J., presiding.

From the testimony it appeared that the defendant was the teacher of a district school in Burlington, and that the plaintiff, whose age was about eleven years, was one of his pupils; that one day, about an hour and a half after the close of school in the afternoon, and after the plaintiff had returned home from school, and while he was driving his father's cow by the defendant's house, in presence of the defendant and of some of his fellow pupils, the plaintiff called the defendant *Old Jack Seaver*; that the next morning, after school had commenced, the plaintiff having come to school as usual, the defendant, after reprimanding the plaintiff for his insulting language the evening before, whipped him with a small rawhide. The testimony on the part of the plaintiff tended to show that this whipping was severe and excessive, while that of the defendant tended to prove the contrary.

On trial the defendant offered to prove that up to the time of the alleged trespass his ordinary management of his school had

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always been mild and moderate. To the admission of such evidence the plaintiff objected, but the court held it admissible, and testimony was introduced tending to prove such to be the fact. To the admission of this testimony the plaintiff excepted.

The defendant also offered testimony tending to prove that at a former trial of this case before a justice of the peace, neither the plaintiff, nor his father, nor his counsel claimed that the punishment of the plaintiff was excessive, but that the only claim then was that the defendant had no right to punish the boy for acts done out of and away from the school. The plaintiff objected to the admission of this testimony, but the court admitted it, to which the plaintiff excepted.

The defendant also proposed to show that it was the usage and custom of the teachers in other schools in Burlington to use raw-hide whips in the punishment of their scholars. The plaintiff objected to such testimony, but the court admitted it, to which the plaintiff excepted.

The court charged the jury among other things, that if the plaintiff, while passing the defendant in the presence of other pupils of the same school, used toward him and in his hearing contemptuous language, with a design to insult him, and the tendency of this conduct, if unpunished, would be to bring the authority of the master over his pupils into contempt, and lessen his hold upon them and his control over the school as their teacher, the defendant had the right, upon the lad's return to the school the next day, to punish him for such misconduct, although it occurred after the school had been dismissed for the day, and after the boy had returned home and while he was driving his father's cow from the pasture by the house of the defendant, and that the jury would judge of the import of the language used, the design with which it was used, and its tendency.

The jury were also told, that it was both reasonable and proper that the scholar should be made to understand for what he was about to be punished; and that if in this case the plaintiff understood at the time what he was punished for, this was enough without any formal communication from the master.

In regard to the instrument used by the master in making the correction, the court declined to tell the jury that the use of it,

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as matter of law, rendered the defendant liable in this action, but instructed them that this question was for them to decide, and that they should take into consideration the instrument used in making the correction, as having a bearing on the character of the punishment, and the motives which may have influenced the master in inflicting it; that if the instrument was an improper one, the bearing would be against the master; but if otherwise, in his favor; and the court, after referring to the testimony in relation to the instrument, submitted it to the jury as a question of fact for them to determine in regard to the suitability or the unsuitableness of the instrument used by the defendant.

Upon the question whether the defendant should be held liable for an excess in punishment inflicted upon the plaintiff, and for the purpose of illustrating to the jury the principles that should govern in actions of this kind, the court, as part of their charge, read to the jury from page 287 of Reeve's Domestic Relations, relative to the rights and duties of parent and child, the following paragraph:

"The parent has a right to govern his minor child, and as incident to this, he must have power to correct him. The maxim is, that he has power to chastise him moderately. The exercise of this power must be, in a great measure, discretionary. He may so chastise his child as to be liable in an action against him by the child for a battery. The child has rights which the law will protect against the brutality of a barbarous parent. I apprehend, however, it is a point of some difficulty to determine with exact precision when a parent has exceeded the bounds of moderation. That correction which will be considered by some triers as unreasonable will be viewed by others as perfectly reasonable. What may be considered by some a venial folly to which none or very little correction ought to be applied, by others will be considered an offence that requires very severe treatment. The parent is bound to correct a child, so as to prevent him from becoming the victim of vicious habits, and thereby proving a nuisance to the community.

The true ground on which this ought to be placed, I apprehend, is that the parent ought to be considered as acting in a judicial capacity when he corrects, and of course not liable for errors of

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opinion. And although the punishment should appear to the triers to be unreasonably severe, and in no measure proportioned to the offence, yet if it should also appear that the parent acted conscientiously and from motives of duty, no verdict ought to be found against him. But when the punishment is, in their opinion, thus unreasonable, and it appears that the parent acted *malo animo*, from wicked motives, under the influence of an unsocial heart, he ought to be liable to damages. For error of opinion he ought to be excused, but for malice of heart he must not be shielded from the just claims of the child. Whether there was malice, may be collected from the circumstances attending the punishment. The instrument used, the time when, the place where, the temper of the heart exhibited at the time, may all unite in demonstrating what the motives were which influenced the parent. These observations are equally applicable to the case of a schoolmaster or to any one who acts *in loco parentis*."

The court also read to the jury the following paragraphs from the same work, on pages 374 and 375 :

"The master has the right to give moderate corporeal punishment to his servant for disobedience to his lawful commands, negligence in his business, or for insolent behavior."

"This right of correction is personal, and cannot be delegated to any one. A schoolmaster, in his own right, and not by delegation, possesses this power. A master cannot justify a wounding of the servant. This term, as used in our books, must, I think, be such a wounding as furnishes evidence that the master acted *malo animo*, which will subject him to damages ; for some wounding, according to the common acceptation of the word, might arise from very reasonable correction ; and although in pleading, it will be difficult to spread upon record the nature of the wounding, the master, if sued, must plead not guilty. Yet I apprehend the jury are not warranted to find him guilty of any the least wounding, providing they found the correction to have been given with the right temper of heart. It must be so disproportioned to the offense as to furnish evidence of the *malus animus*."

The court told the jury that the authority of a schoolmaster over his pupils was nearly related to that of a parent over his child, and that its exercise rested in a measure in discretion, and

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that in a certain sense the schoolmaster acts in a judicial capacity in administering correction to one of his pupils for misconduct, and he should not be made liable for what should be regarded as simply an error in opinion, if it appears he acted with proper motives and in good faith, and in his judgment for the best interests of the school, and that if the jury were satisfied from the evidence that the defendant so acted in the correction of the plaintiff, he should not be found guilty of an excess of severity in the punishment of the plaintiff, though the jury might think that the punishment was too severe, and that he went beyond what the offence of the plaintiff deserved, and beyond what they would have gone in a similar case; that this rule was necessary, and that if a schoolmaster was to be made liable for every error in judgment, in the opinion of a jury, when he acted with good intentions, it would be quite difficult to find a schoolmaster who would assume the authority of correction, without which a school could not well be carried on.

But the court told the jury that if they believed from the testimony that the defendant acted from wicked motives and for the purpose of gratifying his spleen or ill will towards the plaintiff, and the punishment was unreasonably severe, he should be held liable for damages in this action, and that in determining the motives which governed the defendant in giving the correction, they should take into consideration the character of the instrument made use of, as well as the temper of mind exhibited, and all the circumstances and facts bearing upon the event, and on this point it was proper that they should consider the evidence which had been given in relation to similar instruments of correction being kept and used in other schools in Burlington prior to that time.

To the charge of the court, as above detailed, the plaintiff excepted.

The jury rendered a verdict for the defendant.

Roberts & Chittenden, for the plaintiff.

Geo. F. Edmunds, for the defendant.

ALDIS, J. The defendant was a teacher in a public school in Burlington; the plaintiff his pupil. The first question presented

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is, has a schoolmaster the right to punish his pupil for acts of misbehavior committed after the school has been dismissed, and the pupil has returned home and is engaged in his father's service?

It is conceded that his right to punish extends to school hours, and there seems to be no reasonable doubt that the supervision and control of the master over the scholar extend from the time he leaves home to go to school till he returns home from school. Most parents would expect and desire that teachers should take care that their children, in going to and returning from school, should not loiter, or seek evil company, or frequent vicious places of resort. But in this case, as appears from the bill of exceptions, the offence was committed an hour and a half after the school was dismissed, and after the boy had returned home and while he was engaged in his father's service. When the child has returned home or to his parent's control, then the parental authority is resumed and the control of the teacher ceases, and then for all ordinary acts of misbehavior the parent alone has the power to punish. It is claimed, however, that in this case "the boy, while in the presence of other pupils of the same school, used, toward the master and in his hearing, contemptuous language, with a design to insult him, and which had a direct and immediate tendency to bring the authority of the master over his pupils into contempt and lessen his hold upon them and his control over the school." This, under the charge of the court, must have been found by the jury.

This misbehavior, it is especially to be observed, has a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination. It is not misbehavior generally, or towards other persons, or even towards the master in matters in no ways connected with or affecting the school. For, as to such misconduct committed by the child after his return home from school, we think the parents, and they alone, have the power of punishment.

But where the offence has a direct and immediate tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with a design to insult him, we think he has the right to punish the scholar for such acts if he comes again to school.

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The misbehavior must not have merely a remote and indirect tendency to injure the school. All improper conduct or language may perhaps have, by influence and example, a remote tendency of that kind. But the tendency of the acts so done out of the teacher's supervision for which he may punish, must be direct and immediate in their bearing upon the welfare of the school, or the authority of the master and the respect due to him. Cases may readily be supposed which lie very near the line, and it will often be difficult to distinguish between the acts which have such an immediate and those which have such a remote tendency. Hence each case must be determined by its peculiar circumstances.

Acts done to deface or injure the schoolroom, to destroy the books of scholars, or the books or apparatus for instruction, or the instruments of punishment of the master; language used to other scholars to stir up disorder and insubordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools. Upon this point the charge of the court was substantially correct.

II. The court charged the jury that although the punishment inflicted on the plaintiff was excessive in severity and disproportioned to the offence, still if the master in administering it acted with proper motives, in good faith, and, in his judgment, for the best interests of the school, he would not be liable; that the schoolmaster acts in a judicial capacity, and that the infliction of excessive punishment, when prompted by good intentions and not by malice or wicked motives, or an evil mind, is merely an honest error of opinion, and does not make him liable to the pupil for damages. The plaintiff claims that this was erroneous.

1. It is claimed on behalf of the defendant that the schoolmaster is a public officer, that in his government of the school he is invested with public authority, with discretionary powers, and

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acts in a judicial capacity, and so is not liable for errors of judgment. His authority has been likened to that of public officers, such as listers in the case of *Fuller v. Gould*, 20 Vt. 643, the postmaster general in *Kendall v. Stokes*, 8 Howard 87, the mayor of New York in *Wilson v. The Mayor, &c.*, 1 Denio 595, or a commander in the navy, as in *Wilkes v. Dinsman*, 7 Howard 89.

We think the schoolmaster does not belong to the class of public officers vested with such judicial and discretionary powers. He is included rather in the domestic relation of master and servant, and his powers and duties are usually treated of as belonging to that class. In some sense he may be said to act by public authority and to be a public officer, but we do not find him spoken of anywhere as acting in a judicial capacity, except in the passage from Reeve's Domestic Relations, which was read to the jury. In no proper sense can he be deemed a public officer exercising, by virtue of his office, discretionary and *quasi judicial* powers.

2. It is also said that he stands *in loco parentis*, and is invested with *all* the authority and immunity of the parent. Such would seem to be the doctrine of the passage cited from Judge Reeve's work.

The parent, unquestionably, is answerable only for malice or wicked motives or an evil heart in punishing his child. This great and to some extent irresponsible power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.

The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence

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is responsible for their reasonable exercise. The limit upon the parental authority transferred to the master is well expressed by Judge BLACKSTONE. He says :

“The master is *in loco parentis*, and has such a *portion* of the powers of the parent committed to his charge, as may be necessary to answer the purposes for which he is employed.” An English annotator, in a note to the passage, very properly adds, “this power must be temperately exercised, and no schoolmaster should feel himself at liberty to administer chastisement coextensive with the parent.”

Judge SWIFT, in his digest, in a very admirable summary of the powers and duties of the schoolmaster, remarks that if the punishment is immoderate, so that the child sustains a material injury, the master is liable in damages. In a recent case in Mass., *Commonwealth v. Randall*, 4 Gray 36, the defendant asked the Judge to instruct the jury that the schoolmaster is liable only when he acts *malo animo*, from vindictive feelings, or under the violent impulses of passion or malevolence, and that he is not liable for errors of opinion or mistakes of judgment, provided he is governed by an honest purpose of heart, to promote by the discipline employed, the highest welfare of the school and the best interest of the scholar.” In the case at bar the court charged substantially according to that request, but in the case reported in Gray the court refused so to charge, and did charge that if the jury found that the punishment was excessive and improper then the master might properly be found guilty.

The charge was held to be correct upon the hearing of the defendant's exceptions in the supreme court. In the case of *Hathaway v. Rice*, 19 Vt. 102, we think the principle involved in the decision establishes the same doctrine.

Suits of this character have frequently arisen in this State, and the rulings of our courts at *nisi prius* have, we think, been quite uniform on this point. The law, as we deem it to exist, is this :—A schoolmaster has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining upon what is a reasonable punishment, various considerations must be regarded, the nature of the offence, the

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apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. Among reasonable persons much difference prevails as to the circumstances which will justify the infliction of punishment, and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has by being on the spot to know all the circumstances, the manner, look, tone, gestures and language of the offender, (which are not always easily described,) and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by way of protecting him in the exercise of his discretion. Especially should he have this indulgence when he appears to have acted from good motives and not from anger or malice. Hence the teacher is not to be held liable on the ground of excess of punishment, unless the punishment is *clearly* excessive and would be held so in the general judgment of reasonable men. If the punishment be thus *clearly* excessive, then the master should be held liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive. But if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt. Upon this point there was error in the charge.

III. The court admitted evidence to show that the general character of the defendant, as a master, in governing his school, was mild and moderate.

As the court put the case to the jury upon the question of the defendant's malice in inflicting the punishment, this evidence, in that view, might be admissible as tending to disprove such intent. It might, perhaps, be properly said that the nature of such an action, turning upon that point, involved the character of the defendant.

But as we have already decided that the question of excessive punishment is not affected by the motive or intent of the master, we are of opinion that this evidence of general good character is not admissible upon that issue. Good character does not tend to

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prove that the assault and battery were or were not committed, or that the punishment was or was not excessive.

But when evidence is given tending to show, that the master acted maliciously or wantonly, from an evil heart, and the plaintiff claims to recover damages on that ground, there we think the evidence would be admissible, (1 Greenleaf's Evidence, sec. 54 and notes,) to rebut such intent. But it should be strictly limited to that purpose. In other respects we find no error in the charge.

IV. Whether a rawhide was a proper instrument of punishment was left to the jury with very suitable instructions.

The evidence to show that the rawhide was used in other schools in the vicinity was properly admitted to rebut the charge of malice, by showing that he did not resort to an unusual instrument of punishment.

The testimony to show the plaintiff did not claim an excess of punishment on the first trial was proper, as tending to prove that that claim on the then pending trial was not well founded.

Judgment reversed

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Partnership. Promissory notes. Jury.

If the several members of a partnership have power to bind the firm by the execution of promissory notes in the firm name in matters pertaining to the partnership business, the firm will be liable to the *bona fide* purchaser of a note in their name, though executed by one partner, even though it be without consideration, or upon a consideration not inuring to the partnership use.

The questions, whether the holder of current negotiable paper has taken it with or without notice of defences between prior parties, whether he has exercised good faith in the transaction, or has been guilty of negligence or a want of proper care, are always questions of fact to be determined by a jury.

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The defendant, residing at Burlington, was a member of a firm of wharfingers, the other members of which resided and did the firm business at Port Kent, N. Y., the defendant having no active participation in the management of the business. One of the firm, without the defendants' knowledge, executed in the partnership name three notes, one for five hundred dollars, and two for one thousand dollars each, without consideration, all dated in the same month, and payable to C., or order, who, before their maturity, negotiated them for a valuable consideration to the plaintiffs, to whom he was largely indebted, and who knew that he was insolvent and that the defendant did not reside at the place of the business of the firm, where the notes were dated. The plaintiffs had no knowledge of any custom or necessity of the defendants' firm to execute notes, and took the notes in question relying on the responsibility of the defendant, and supposing them to be business notes, but they made no inquiry as to his knowledge of their execution, or whether they were in fact business or accommodation paper.

The plaintiffs having sued the defendant on the notes, the case was referred, and the referee, after reporting the foregoing facts, stated that he was of opinion from said facts that the plaintiffs ought, in good faith towards the defendant, to have inquired, before they took the notes from C., whether the defendant had authorized the making of them, and that they were wanting in due diligence in not inquiring of the defendant, or C., whether they were accommodation notes or not; *Held*, that this statement of this opinion of the referee was to be considered as the decision by him of questions of fact, and as such was conclusive; that the facts recited by him had a legal tendency to support such a decision; and that the plaintiffs were not entitled to recover.

The purchaser of negotiable paper must exercise reasonable prudence and caution in taking it; and if the circumstances are such as would excite the suspicion of a prudent and careful man in regard to the binding force of the paper as between the original parties, and the purchaser take it without making inquiry, he will not stand in the position of a *bona fide* holder, and cannot recover upon it, though he may have paid value for it.

ASSUMPSIT. The action was prosecuted only against Isaac Nye, one of the defendants, a *non est* return having been made as to the others, Colvin and Allen. The case was referred and the referee made the following report:

"The plaintiffs claim to recover upon three promissory notes, one for one thousand dollars, dated Port Kent, May 1st, 1854, payable four months after its date; one for one thousand dollars, dated Port Kent, May 5th, 1854, payable three months from its date; and one for five hundred dollars, dated Port Kent, May 25th, 1854, payable three months from its date, all made payable to the order of Peter Comstock; the two for one thousand dollars each, at the Albany City Bank, at Albany, New York, and

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the one for five hundred dollars, at the Troy City Bank, Troy New York, and all signed Colvin, Allen & Co.

And the plaintiffs further claim a recovery, upon a receipt, or wharfinger's certificate, dated Port Kent, January 6th, 1854, and signed Colvin, Allen & Co., certifying that P. Comstock, for the Franklin Falls Lumber Co., had left in the hands of Colvin, Allen & Co., five thousand new mill white pine boards, to be held subject to the return of said certificate, and to his order thereon.

The referee finds that during the whole of the year 1854, and for some time before and after that year, Alvin Colvin and Charles P. Allen, of Port Kent, New York, and Isaac Nye, of Burlington, in this State, were tenants in common and joint owners of a wharf, with store houses thereon, at Port Kent, and under the firm name of Colvin, Allen & Company carried on copartnership business at Port Kent, which consisted chiefly in receiving, storing and forwarding freight, and collecting and paying freight bills, and making occasionally some small advances upon freight. Said business was conducted and managed by Colvin and Allen for the most part, Nye taking no active part in its management.

The nature and character of their business was such that it became necessary for them occasionally to obtain credit to some small extent. During the year 1854, notes were discounted for Colvin, Allen & Company, at the Essex County Bank, Keeseville, New York, from four to six times, but for what purpose and to what amount the referee is unable to find.

In the winter of 1853 and 1854, and the spring of 1854, Peter Comstock, representing the Franklin Falls Lumber Company, drew and deposited lumber upon the defendants' wharf, and the wharfinger's receipt now in question was given by Allen to Comstock for lumber so deposited.

The notes in question were also made and signed by Allen, at Port Kent, at their respective dates, and were delivered to Comstock by Allen without any value or consideration, but merely for the benefit and accommodation of Comstock in carrying on his own business, which was the manufacture of lumber, and which he carried on under the name of the Franklin Falls Lumber Company.

Comstock, during the spring of 1854, while these notes were

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current, negotiated, transferred and indorsed the same to the plaintiffs at Troy, who were doing partnership business there, as merchants and traders, and who discounted them supposing them to be business notes.

In the early part of 1854, Comstock also transferred and indorsed to the plaintiffs the wharfinger's receipt or certificate above described. And the plaintiffs paid him full value for the notes and receipt when they were so negotiated by him.

But the referee finds that the notes and certificate were so made and delivered by Allen to Comstock, and so negotiated by him to the plaintiffs without the knowledge or consent of Nye, and that Nye was never aware that any notes had been discounted at any time for Colvin, Allen & Company at the Essex County Bank, or elsewhere, until long afterwards, or that notes or certificates were used in their business at all, but he knew it was customary in such business to give certificates.

When these notes were discounted by the plaintiffs for Comstock, the plaintiffs supposed them to be business notes, but Comstock was at the same time largely indebted to them and they knew he was insolvent. They did not know that it was customary for Colvin, Allen & Company, or any other wharfingers on Lake Champlain, to use promissory notes in carrying on their business. They knew Colvin and Allen as wharfingers, but did not know their responsibility; but in purchasing the notes they relied almost entirely upon Nye, whom they were informed was a partner with Colvin and Allen, and owned considerable property, and they knew he lived in Burlington, but they made no inquiry as to his knowledge of the making of the notes, or whether they were business or accommodation notes.

It was customary for Colvin, Allen & Company, on the delivery of property upon their wharf for transportation, to give receipts or certificates like the one in question, and at the time Comstock gave the receipt in question to the plaintiffs, the referee finds that Colvin, Allen & Company were holding the lumber described in the receipt, and that the same was then worth eight hundred dollars, the sum advanced by the plaintiffs to Comstock upon the receipt; that the plaintiffs afterwards sent the receipt forward for collection, and it was returned uncollected, but there

was no evidence before the referee that the plaintiffs have ever made any demand upon Colvin, Allen or Nye for said lumber; but it was proved, and the referee finds, that there is not now, nor has there been within three years, any lumber on said wharf to answer to the receipt, or any lumber in the hands of Colvin, Allen & Company belonging to said Franklin Falls Lumber Company.

The plaintiffs brought suits upon these notes in Troy, but obtained no personal service upon Nye, and obtained judgments June 26, 1855, against Colvin, Allen and Nye, but by the laws of New York the judgment against Nye had only the effect to hold all the joint property of the firm of Colvin, Allen & Company in that State.

The referee is of opinion from the facts here found and submitted, that the plaintiffs ought, in good faith towards Nye, to have inquired before taking these notes of Comstock, whether Nye had authorized the making of them, and were wanting in due and reasonable diligence in not making any inquiry of Nye or Comstock whether the same were accommodation notes merely, and if so whether they were authorized by the defendant.

If the court, from the facts reported, should consider that the plaintiffs are entitled to recover the amount of the notes and receipt, the referee finds due the plaintiffs the sum of forty-one hundred and seventy-three dollars and two cents; but if the court should consider that the plaintiffs are entitled to recover upon the notes and not upon the receipt, the referee finds due the plaintiffs thirty-one hundred and forty-nine dollars and two cents; but if upon the receipt and not upon the notes, the referee finds due the plaintiffs the sum of ten hundred and twenty-four dollars."

But should the court consider that the plaintiffs are not entitled to recover, either upon said notes or said receipt, the referee finds that there is nothing due to either party.

The county court, at the September Term, 1858, in Chittenden county,—BENNETT, J., presiding,—rendered judgment, *pro forma*, on the report for the plaintiffs for the largest sum reported by the referee, to which the defendant Nye excepted.

E. B. Hard and J. French, for the defendant Nye.

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1. The plaintiffs were not entitled to recover upon the wharfinger's certificate. 1 Chitty's Plead. 2, 5; *Collins v. Lincoln*, 11 Vt. 268; *Jones v. Fales*, 4 Mass. 245.

2. Admitting the plaintiffs to be *bona fide* holders of the notes, Nye was not liable upon them, because the nature of their partnership and the character of their business were not such as to authorize one partner to bind the firm by executing negotiable instruments; Collyer on Part. sec. 402; *Dickinson v. Valpy*, 10 B. & C. 128; *Levy v. Pyne*, 1 Carr. & Marsh. 436; *Hedley v. Bainbridge*, 3 Ad. & E., N. S. 315.

3. The plaintiffs hold the notes subject to all defences that might have been made to them in the hands of Comstock; and as he could not have enforced them against Nye, the plaintiffs cannot.

a. The referee having found that Colvin, Allen & Company were mere accommodation signers of the notes for Comstock, and that this was a fraud upon Nye, *it was incumbent upon the plaintiffs to show that they received the notes in the due course of business, for value, and that they were guilty of no want of care in taking them*; *Sandford v. Morton*, 14 Vt. 228.

Therefore, as the referee does not find that the plaintiffs took the paper in the usual course of business, and in the exercise of due caution, the defendant is entitled to judgment.

b. Irrespective, however, of any question as to the burden of proof, it is well settled law that if the indorsee of a note takes it in bad faith, or without due caution, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker may be let in to his defence. And the referee having found affirmatively that "the plaintiffs ought, in good faith toward Nye, to have inquired before taking said notes of said Comstock, whether said Nye had authorized the making of said notes, and were wanting in due and reasonable diligence in not making any inquiry," etc., the case is rendered conclusive in favor of the defendant; 3 Kent. Com. 93 *et seq.*; *Gill v. Cubit*, 3 B. & C. 466, (10 E. C. L. 154.); *Strange v. Wigney*, 6 Bing. 676, (19 E. C. L. 305.); *Brown v. Davis*, 3 Term 80; *Grant v. Vaughan*, 3 Burr. 1576; *Easley v. Crockford*, 10 Bing. 243, (25 E. C. L. 116.); *Eagan v. Threlfall*, 5 D. & B. 326, (16 E. C. L.

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237.); *I'own v. Halling*, 4 B. & C. 330, (10 E. C. L. 347.); *Snow v. Peacock*, 2 C. & P. 215, (12 E. C. L. 535.); *Slater v. West*, 3 C. & P. 325, (14 E. C. L. 330.); *Cunliff v. Booth*, 3 Bing. N. C. 82, (32 E. C. L. 339.); *Haynes v. Foster*, 2 C. & M. 237; *Sandford v. Norton*, 14 Vt. 228; *Ayer v. Hutchins*, 4 Mass. 273; *Thompson v. Hale*, 6 Pick. 259; *Cone v. Baldwin*, 12 Ib. 545; *Hall v. Hale*, 8 Conn. 336; *Beltzhoover v. Blackstock*, 3 Watts 20; *Pringle v. Phillips*, 5 Sandf. 157; *McKesson v. Stanbury*, 23 Ohio 213; *Nichols v. Patton*, 13 Louis. 213; *Wiggin v. Bush*, 12 Johns. 205; *Fowler v. Aranthy*, 14 Pet. 318; 1 Am. L. C. 338 *et seq.*

4. The statement in the report above quoted as to the plaintiffs' want of good faith and due caution, is not the mere legal opinion of the referee, but the distinct finding of a fact by him, and as such is conclusive.

And if the referee had not found such to be the fact, the circumstances detailed in the report are quite sufficient to show it.

5. The judgment against Colvin, Allen & Company rendered in New York, is a bar to any recovery against Nye in this action; 1 Chitty's Pl. 47; *Robertson v. Smith*, 18 Johns. 459; *Smith v. Black*, 9 S. & R. 142; *Perry v. Martin*, 4 Johns. Ch. 566; *Downey v. F. & M. Bank*, 13 S. & R. 288; *King v. Hoane*, 13 M. & W. 404; *Ward v. Johnson*, 13 Mass. 148; *Clark et al. v. Candee et al.*, 2 Mich. (Gibbs) 255.

Roberts & Chittenden, for the plaintiffs, cited Chitty on Bills, 217-257; *Crook v. Jadis*, 5 Barn. & Ad. 909; *Backhouse v. Harrison*, *Id.* 1098; *Foster v. Pearson*, 1 Crompt. M. & R. 849; *Uther v. Rich*, 10 Ad. & El. 784; *Goodman v. Harvey*, 4 Ad. & El. 870; Story on Bills, sec. 195; Story on Promissory Notes, sec. 382; 2 Greenl. Ev., sec. 639; Collyer on Part., Sec. 448; *Sanderson v. Brooksbank*, 4 Car. & P. 286; *Worcester Co. Bank v. Dorchester & Milton Bank*, 10 Cush. 488; *Brush v. Scribner*, 11 Conn. 395; Greenleaf's Overruled Cases, 187.

POLAND, J. I. The first ground of defence which the defendant Nye sets up to the three notes is, that the members of the firm of Colvin, Allen & Company had no authority to bind the firm by signing the partnership name to negotiable promissory

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notes, even in the legitimate business of the firm, or for money obtained to be used in their business; that no such power was expressly conferred upon the several partners, and that it was not necessary in order to carry on the business of the firm, and therefore could not be inferred or implied. Upon this part of the case the court are not fully agreed, and the point is therefore left undecided. Assuming that the members of that firm had legal authority to bind it by signing the partnership name to negotiable promissory notes, for the real use of the firm and in its business, it is not claimed that they had power to pledge the partnership name for the accommodation of other persons, for that was not within the scope of their business. But if the several partners had power to bind the firm at all by the execution of such instruments in their business, they would be liable to a *bona fide* holder of a note executed by a member of the company in their name, though really without consideration, or upon a consideration not inuring to the partnership use.

II. This brings us to the consideration of the important point involved in the case. Are the plaintiffs, upon the finding and report of the referee, *bona fide holders* of these notes against the defendant Nye?

Much of the difficulty which has arisen in determining this case, has been occasioned by the peculiar character and language of the referee's report, and the different constructions placed upon it by counsel, and different members of the court.

He reports that Comstock transferred the notes to the plaintiffs while they were current, receiving from them a full consideration for them, the plaintiffs supposing them to be business notes, but making no inquiry as to their origin or consideration, or whether they were accommodation notes, or their execution authorized by the defendant Nye.

After detailing all the circumstances in relation to the condition of the various parties, which are relied upon by the defendant as affecting the plaintiffs with notice that the notes were not authorized by or binding upon him, the referee sums up in the following language: "The referee is of opinion from the facts here found and submitted, that the plaintiffs ought, in good faith towards Nye, to have inquired before taking said notes of said Comstock,

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whether said Nye had authorized the making of said notes, and were wanting in due and reasonable diligence in not making any inquiry of said Nye or Comstock, whether the same were accommodation notes and authorized by the defendant."

The counsel for the plaintiffs insist that this is not to be understood as a finding or conclusion of *fact* by the referee, but that it is merely the expression of a legal opinion upon the effect of the facts before recited, and that the court are left to apply the law to those facts, without reference to any adjudication by the referee. But the questions, whether the holder of current negotiable paper has taken it with or without notice of defences between prior parties, whether he has exercised good faith in the transaction, or has been guilty of negligence or a want of proper caution, are always questions of fact to be submitted to and determined by the jury. All the circumstances attending the transaction, the condition of the several other parties, and all other facts that bear upon such an issue, are only evidence for the jury to weigh in deciding it.

In this case the referee stood in the place of a jury, and it was his duty to weigh all evidence bearing upon that subject, and draw the proper conclusion of fact therefrom. We are of opinion that such was the purpose of the referee, and when he says "the referee is of opinion," it is to be understood the same as if he had said the referee *finds*, or *decides*, or *adjudges*, etc. Taking the whole report together, what is the fair result of the referee's finding as to the taking of these notes by the plaintiffs from Comstock, and their knowledge or want of knowledge of their true character, and their diligence or negligence in obtaining information on that subject?

He finds they received the notes while current, and paid full value for them, and had no knowledge in fact that they were executed by Allen in fraud of, or without authority from the defendant Nye, but that at the same time, from their knowledge of the condition of Comstock and his business with them, and their knowledge of the business of Colvin, Allen & Company, and the nature of the defendant Nye's connection with them, and the circumstances of this transaction itself, they must, as men of ordinary prudence and sagacity, have suspected that these notes

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were not ordinary business notes of Colvin, Allen & Company, but were given merely for the accommodation of Comstock, and without the assent of Nye, and that having reason to suspect this they made no inquiry upon the subject. The plaintiffs claim that if the referee's finding is to be treated as one of fact, the evidence reported has no legal tendency to support his finding, or in other words, that none of the circumstances detailed by him were of such a nature or character as justly to raise any suspicion in the plaintiffs that the notes were not proper business notes of Colvin, Allen & Company. It is always more difficult to determine from a mere written narration of such facts what proper tendency they have, and what inferences should be legitimately drawn from them, than it is when the parties and witnesses are before the trier, and the whole transaction and all its surroundings are seen. But as the facts are detailed in the report, we think they do legally tend to support the finding of the referee. The fact of Comstock's insolvency, and his indebtedness to the plaintiffs, might afford a very considerable amount of evidence as to the probability that he would have notes of Colvin, Allen & Company to so large an amount, arising solely from business transactions between them, but there is hardly enough stated in reference to those matters to enable us to say how strong an inference could be drawn from that. The referee had far better opportunity to judge correctly.

The large amount of these notes, the fact that they were executed so nearly at the same time, and that they were all for round sums, of five hundred, and one thousand dollars, had a tendency to excite suspicion that they did not arise out of ordinary business dealings. This, taken in connection with the knowledge of the plaintiffs that the business of the firm was done by Allen and Colvin at Port Kent, and that Nye lived at Burlington and had no participation in the management of the business, had a tendency to excite doubt and suspicion whether these notes were executed with his knowledge and approbation.

Without taking further time to comment upon these facts, it is sufficient to say that the evidence reported, in our judgment, legally tended to support the finding of the referee, and if so we cannot disturb it, as the same has the conclusive effect of a verdict.

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This brings us to the consideration of the legal question which has formed the principal topic of discussion in the case. What notice of a defence to a note or bill between the original parties is necessary in order to deprive a holder for value of the legal character of a *bona fide holder*? Is actual knowledge of the fact necessary; or must he have so much knowledge on the subject as to make it absolute bad faith or fraud on his part to become a purchaser; or is it enough that there are such circumstances of suspicion attending the matter as would induce a man of ordinary sagacity and prudence to suspect some infirmity in the holder's title, or the validity of the instrument itself?

It is not claimed by the plaintiffs' counsel that absolute or positive knowledge is necessary to be proved, but they insist that notice of such facts must be proved as to make it a case of fraud or bad faith in him to become the purchaser; while the defendant's counsel claim that notice of such facts as create any fair ground of suspicion on that subject, and such as would put a careful and prudent man on inquiry, is all that is necessary, if the party omits to make reasonable and prudent investigation to learn the truth. Both claim to be supported by authority, and cases are cited which do support each of these rules.

Previous to the case of *Gill v. Cubit*, 3 B. & C. 466, (10 E. C. L. 154.) the rule does not appear to have been very definitely settled in the English courts. The language of judges in different cases seems to vibrate between the two; but in that case the rule was distinctly laid down by the court of King's Bench in very strong and clear terms, that the purchaser of negotiable paper must exercise reasonable prudence and caution, and that if the circumstances were such as ought to have excited the suspicion of a prudent and careful man, and he made no inquiry, he did not stand in the legal position of a *bona fide holder*. This case seemed to have established the rule in the English courts, and was fully adopted, and substantially the same rule was laid down in a large number of reported cases, many of which have been cited by the defence. The rule was put forth by all the writers upon mercantile law as the rule governing the transfer of negotiable paper. The same rule was adopted by the courts of this country generally, and seemed to have become a fixed rule

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in the law of negotiable paper. But after having been so often followed as to have become apparently permanent, the court of King's Bench, under the lead of Lord DENMAN, abandoned it, and adopted the rule that nothing short of actual bad faith or fraud in the purchaser, would deprive him of the character of a *bona fide* purchaser, and let in defences existing between prior parties: that no circumstances of suspicion merely, or want of proper caution in the purchaser, will have this effect, and that even gross negligence has no effect, except as evidence tending to establish bad faith or fraud.

This was decided in the case of *Goodman v. Harvey*, 4 A. & E. 870, (31 E. C. L. 212,) and in several other cases in England, and may now probably be regarded as the settled rule in the English courts. Since these latter decisions have been made, Judge STORY, Professor GREENLEAF and other writers have quoted them as changing the rule of law on the subject. As before stated, the rule laid down in *Gill v. Cubit* was generally adopted by the American courts and seemed to have become the settled law of this country, until the later decisions in England, and the promulgation of them by Judge STORY and Professor GREENLEAF in their legal treatises. We have been referred to but one American case which can properly be regarded as an adoption of the later English rule; that is the case of *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cushing 488. That case, however, was an action to recover the amount of a bank bill which had been stolen, and the court strongly intimated that there may be a difference between bank bills which pass in community from hand to hand as money, and ordinary negotiable paper. Still, the court treat the case of *Goodman v. Harvey* and the cases following it, as having settled the rule of law according to those decisions. But the subject does not appear to have been very thoroughly examined, and the several cases in Massachusetts which followed the earlier rule are not even alluded to. We have also been referred to a case in the 11th Conn. 338, *Brush v. Scribner*, where the court speak of *Gill v. Cubit* as having been overruled by subsequent cases in England. But this question was not before the court. The question in that case was, whether one could be a *bona fide* holder of a bill or note

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which he received in payment of an antecedent debt. We have been referred to the case of *Pringle v. Philips*, 5 Sandf. 157, decided by the superior court in the city of New York in 1851.

The whole subject is there most ably examined by DUER, J., and all the cases, both English and American, are carefully and ably reviewed. That court upon the fullest consideration, both upon authority and reason, establish the rule as laid down in *Gill v. Cubit*. It is but just to say that the decisions of no tribunal in the country upon questions of commercial law are entitled to more consideration than those of the superior court of New York at the date of that decision. The only case in our own reports that we are aware of where this question has been discussed at all, is that of *Sandford v. Norton*, 14 Vt. 228. The precise question was not before the court in that case, but came up incidentally. The question appears however to have been examined, and the English cases are cited, and the fact that *Gill v. Cubit* had been departed from by the English courts is alluded to, but the court express a decided opinion in favor of the doctrine held in that case.

In our judgment that doctrine is best sustained by authority. But if the question were wholly new, and we were now called upon to establish a rule for the first time, we should feel no hesitation in saying that such should be the rule to govern the purchase and transfer of negotiable securities. / It is the rule which is applied to all other cases of business dealings when the rights of third persons may be thereby affected, both in relation to real and personal property. In the case of sales of personal property by one who obtained it by such a fraud as entitles the original owner to reclaim it from the fraudulent vendee, but not from one who had honestly purchased it from him, this rule has been repeatedly applied. So in case of the sale of real estate by one holding the apparent title, when another is the real owner by an unrecorded deed, the same rule is established. Why should not the same rule apply in case of the sale and transfer of negotiable securities, and thus render the law uniform upon the whole subject? / The reason given by the English judges for a different rule as to mercantile paper is, that such a rule operates as a clog

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and impediment to the transfer of such securities, and therefore in restraint of trade, and is put mainly upon the score of policy. But it seems to us that the rule rests on a deeper foundation than any mere question of policy, and is founded upon substantial principles of natural justice, and that no different rule can be adopted consistent with honesty and fair dealing among men. DUER, J., in the case of *Pringle v. Phillips*, says "the principle of the doctrine of constructive notice is, that when a person is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry into the facts is a moral duty, and diligence an act of justice. Hence he proceeds at his peril when he omits to inquire, and is then chargeable with a knowledge of all the facts that by proper inquiry he might have ascertained." It does not appear to us proper that any new rule of policy should be allowed to overbear a principle so just and sensible, nor that the exigences of trade or of commercial men require any abandonment of the ordinary rules of honest dealing among men, or that any class of men should in their dealings be allowed to totally disregard the just rights of others.

It is now a settled rule of law that the purchaser of negotiable paper overdue, takes it subject to all defences which exist between prior parties, and though he pay full value for the paper, and have no knowledge of such defence, or any cause to suspect any except from the papers being overdue, the case is not altered, the rule is inflexible.

The only ground of this rule is, that the fact of the paper not being paid at maturity furnishes ground of suspicion that there is some reason why it should not be paid, and this is enough to put the purchaser on inquiry to ascertain the truth, before making the purchase. If he neglect this he incurs the hazard of all defences which may exist, and his entire honesty and good faith in the transaction will not avail him at all.

The existence of this rule and the reason on which it is founded, seem to be entirely at war with what we think may properly be called Lord DENMAN's doctrine in the later English cases. We are therefore of opinion that the plaintiffs, upon the referee's report, are not entitled to recover the amount of the three notes.

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III. This view renders it unnecessary to decide the question raised as to the effect of the judgment recovered by the plaintiffs in New York.

IV. The plaintiffs do not claim that the receipt for lumber is a negotiable instrument that could be transferred to them, so that they can recover upon it as such. This part of the case is put upon the ground that the transfer of the receipt to them was equivalent to a purchase by them of the lumber in the hands of Colvin, Allen & Company, and that they became thereby the owners of it, and that if Colvin, Allen & Company converted the lumber into money they could recover the money under the general counts.

Conceding that the transfer of the receipt made the plaintiffs the owners of the lumber, in order to enable the plaintiffs to recover of the defendants, they must show that the defendants have actually received the money for it.

The case fails to show any such fact; the referee reports that there was no evidence what became of it. The judgment of the county court is therefore reversed, and judgment rendered for the defendant.

WILLIAM H. ROOT v. CLARK W. REYNOLDS.

Fraudulent conveyance.

If one is so connected with the property of another, and the business in which it is used, that he honestly supposes it necessary for the preservation of his business interests to purchase it, and does purchase it for a full consideration for that reason, and with no intent to aid the seller in a fraud upon his creditors, the sale will be valid, so far as regards the purchaser, as against the creditors of the vendor, notwithstanding the purchaser knows that the object of the seller in making the sale is to defraud his creditors.

But *aliter*, if the purchaser, with knowledge of the vendor's fraudulent intent, be a mere volunteer in the purchase, and buy the property simply because he can make a good bargain.

The doctrine of *Lowell v. Edgell*, 4 Vt. 405, in regard to fraudulent conveyances, considered and explained.

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REPLEVIN for a quantity of personal property consisting of stock, tools, &c., suitable for use in an iron foundry. Plea the general issue with notice of special matter in defence, and trial by jury at the March Term, 1858, in Chittenden county, BENNETT, J., presiding.

It was admitted that the plaintiff had a perfect title to one undivided half of the property in question, and the sole question at issue was in regard to the validity of his title to the other half.

The plaintiff's testimony tended to show that being a tenant in common with one Emerson of the whole property described in the declaration, he purchased the undivided half thereof in question from Emerson, that he paid him an ample consideration therefor, that his purpose in buying this moiety was to prevent a ruinous competition in business, as he owned another foundry within a short distance from the one owned by himself and Emerson, that upon the purchase he took actual possession of the property, and that it was subsequently taken from him by the defendant.

The defendant's testimony tended to show that he attached the undivided half in question, as a deputy sheriff, upon a writ in favor of one Brickett against Emerson, and took and held the property by virtue of such attachment, that Brickett was a creditor of Emerson, that Emerson at the time of the sale of the undivided half of the property to the plaintiff, was insolvent, that the object of both Emerson and the plaintiff in making such sale to the latter was to defraud the creditors of the former by withdrawing the property from their reach, and retaining it for Emerson's use, that Emerson informed Root before the sale that such was his purpose, but not until after the terms of the bargain had been agreed upon, and the bill of sale drawn up but not executed.

The plaintiff's testimony tended to prove, not only that he paid a full consideration for the undivided half of the property, but also that he acted in good faith in the purchase of it, and bought it because he thought it essential for his own benefit that he should buy it so as to maintain the foundry business in the neighborhood, and that he did not make the purchase for the purpose of injuring or delaying the creditors of Emerson in their rights.

The defendant requested the court to instruct the jury that if they should find that, at the time of the sale to the plaintiff, Emer-

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son was insolvent, and that his object in making the sale was to defraud his creditors, and that these facts were known to the plaintiff at the time of the purchase, the sale would be fraudulent and void as to Emerson's creditors, and that their verdict should be for the defendant.

But the court, among other things not objected to, charged the jury that if Emerson's object in making the conveyance of the moiety of the property in dispute to the plaintiff, was to withdraw it from the reach of his creditors and to delay them in their rights to collect their debts, and that Root, knowing his object, bought the property of him to aid him in defrauding his creditors and to enable him to withdraw it from their reach, the sale would be fraudulent and void as against the creditors of Emerson, notwithstanding the plaintiff had given a full and ample consideration for the property.

But if, on the other hand, they were satisfied that Root had paid a full consideration for the property and that he acted in good faith, and purchased the property, not for the purpose of lending himself to Emerson to aid him in withdrawing the property from the reach of his creditors, but for his own individual use and only because he thought it necessary that he should do so for the preservation and promotion of his own business interests, his title to the property would be paramount to that of the subsequent attaching creditors of Emerson, though Emerson was insolvent and designed to prevent by the sale the attachment of this specific property by his creditors, and though the plaintiff was aware of this when he bought and paid for the property.

Under the instructions of the court the jury rendered a verdict for the plaintiff, and the defendant excepted to the omission of the court to charge as requested, and to the charge as given.

E. R. Hard and *Wm. G. Shaw*, for the defendant.

We insist that if Root, with a knowledge of Emerson's fraudulent intent in the sale, purchased the property, even for his own benefit, and paid a full consideration for it, he thereby nevertheless knowingly assisted Emerson in the perpetration of a fraud upon his creditors. In the eye of the law he participated in the fraud. His intentions of a pecuniary benefit to himself cannot

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be separated from the intention of Emerson to defraud his creditors. Root must, therefore, come within the provisions of the statute against fraudulent conveyances, which makes the conveyance null and void as against Emerson's creditors; *Brooks v. Claves*, 10 Vt. 50, WILLIAMS, Ch. J.

The property of an insolvent legally belongs to him for only one purpose, viz: to pay his creditors. He holds it as a trustee for that purpose alone. Any disposition of it by him for any other purpose is fraudulent, and one which he has no right to make. He, therefore, who purchases property of an insolvent, *knowing* his insolvency, and that he makes the sale for the purpose of defrauding his creditors, knowingly receives property from one who has no right to dispose of it in that way and for that purpose. The fact that he pays a full consideration for it, and buys it because he expects to derive a personal benefit from it makes no difference. The voluntary assumption of the risk of paying the full price is made by him entirely in his own wrong, and will not avail him. The *knowledge* by the purchaser of the fraudulent intent of the vendor is the *test* of his title. The fraudulent design of the vendor would be of no effect unless he found a purchaser. One, therefore, who purchases, knowing the evil designs of the seller, notwithstanding he may have purposes of his own in making the purchase, still assists the other in his fraud by voluntarily becoming an element in the transaction, without the existence of which the fraud could not be consummated. *Lowell v. Edgell*, 4 Vt. 405; *Bridges v. Eggleston*, 14 Mass. 250; *Dean v. Connelly*, 6 Barr. 249-250; *Ashmead v. Hean*, 13 Penn. St. (1 Harris) 584; *Zerbe v. Miller*, 16 Penn. St. (4 Harris) 493-497; *Johnston v. Harvey*, 2 Penn. (Penn. & Watts) 82, 86, 93; *Mateer v. Hissim*, 3 *Id.* 160; *Lightfoot v. Tenant*, 1 Bos. & Pul. 554.*

George F. Edmunds, for the plaintiff.

There was no taint nor invalidity in the title of Emerson to the property, and hence the case is quite different from those in which it is held that a purchaser *with* notice of a defect of title is affected by it.

* See also *Robinson v. Holt*, 39 N. H. 557, decided in December, 1859.—
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The plaintiff cannot be punished for bad motives in another, touching an act right in itself, when his own motives were honest, merely because he knows of the ill motives of the other. A mortgage or assignment made to prefer an existing creditor, and with a view on the part of the grantor to delay his creditors, is perfectly good by all the authorities, although the grantee knew the motive of the debtor. The reason is that the consideration being adequate, a proper legal motive is found in the grantee in the protection of his own interests. The transaction is real, not fictitious, and he receives the conveyance not to aid his debtor, but to aid himself in the proper protection of his own interests.

This the jury have found was the case with the plaintiff. He purchased in order to save his own business from ruin.

The statute against "fraudulent and deceitful" conveyances does not apply to such a case. "Fraudulent" and "deceitful" mean the same thing, that is *deceptive* and *colorable*. A sale, therefore, which is made upon a *good* and *adequate* consideration, and which is a real transaction between the parties, is not prohibited. *Holbird v. Anderson*, 5 Term 235; *Richer v. Evans*, 28 E. C. L. 267; *Wheaton v. Sexton*, 4 Wheaton 503; 17 Vesey 262; 3 M. & S. 371; *Ward v. Dixie*, 53 E. C. L. 892; *Beals v. Guernsey*, 8 Johns. 348; *Bridge v. Eggleston*, 14 Mass. 247; *Wickham v. Miller*, 12 Johns. 320; *Hall v. Foster*, 12 Pick. 89; *Harrison v. Phillips Academy*, 12 Mass. 456; *Lyon v. Rood*, 12 Vt. 233; *Colgate et al. v. Hill*, 20 Vt. 56; *Kittredge v. Sumner*, 11 Pick. 51; *Brooks v. Claves*, 10 Vt. 37; 4 Cushing 441; 40 Maine 284; *Bush v. Sherman*, 2 Doug. 176.

BARRETT, J. Upon the case as presented by the bill of exceptions, it is to be taken for the purposes of the decision now to be made, that Emerson's motive in selling the property in question was to withdraw it from the reach of attachment by his creditors; that Emerson was insolvent, and this was known by Root, at the time the trade for the property was closed and consummated, that Root paid a full consideration for it, that he purchased it in good faith, not for the purpose and with the intent of lending himself to aid Emerson in withdrawing his property from the reach of his creditors, but for his own individual use, and only

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because he thought it necessary for the preservation and promotion of his own business interests.

Emerson's conduct was undoubtedly in fraud of his creditors, and if a knowledge by Root of the fraudulent purpose of Emerson, carried into effect by such sale and purchase of the property, is conclusive to affect him as a party to the fraud of Emerson, then it is clear that he cannot prevail in his present suit.

The case excludes the idea of any fraudulent intent on the part of Root, or that he lent himself to aid Emerson in his fraudulent purpose, or that he was a mere volunteer, purchasing because he could buy the property cheap and make a profitable bargain. It shows that he was connected with the property and engaged in the same kind of business that Emerson had been carrying on with it, and that he bought it from a supposed necessity in order to the promotion and preservation of his own business interests.

It is not claimed that the purchase was a sham and pretence, under which the title was to appear to pass, while the property was still to be held for the benefit and use of Emerson.

The question to be determined is, whether Root, in his position relatively to the property and to the other parties, is, by the mere fact of his knowing of the improper and fraudulent purpose of Emerson, to be affected as if party to a fraud against the creditors of Emerson.

We are not prepared to sustain the position of the learned counsel for the plaintiff to the effect that if Root paid a full consideration for the property, and the purchase was not a pretence and designed as a cloak for the benefit of Emerson, then the transaction was valid as against the creditors of Emerson, and Root is entitled to hold the property. Nor do we regard it needful to discuss this position in the light of the authorities cited in its support. The case of *Lowell v. Edgell*, 4 Vt. 405, is an authority against that position, and we are not disposed to question the principle or the reasons on which it rests, so far as the real point that the case presented for decision is concerned. We think cases are not of unfrequent occurrence, which would answer to all the elements of that position, and yet the sales should be held void as to the creditors of the vendor. For instance, if in the present case, Root had been a mere volunteer in the purchase

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and bought only because he could make a good bargain, not caring as to the motives and purposes of Emerson in making the sale, then his having knowledge of those motives and purposes would have affected him in his rights as against the creditors of Emerson, though he in fact paid a full consideration for the property.

But not being a mere volunteer for the purpose of taking advantage of Emerson's desire to sell for the motive and purposes by which Emerson was actuated, but having a connection with the property and the business in which it was to be used, and having motives and reasons for making the purchase, entirely independent of Emerson's motives and purposes in wishing to sell, and which were both honest and adequate to every intent, and in exclusion of any intent or willingness to lend himself in aid of Emerson, we think neither principle, legal or moral, nor authority, requires us to hold that mere knowledge of Emerson's intent and purpose should affect him as being a participant in Emerson's contemplated fraud.

It would seem to be carrying legal ethics to a great length to require a person situated as Root was, to forego the preservation and promotion of the interests of his established business by making such a purchase as he did, free as he was from any fraudulent motive, and moved as he was by an amply adequate motive of the most honest and legitimate character. We think so to hold would contravene the law of the subject as it exists in this State, as evinced by the language of Judge REDFIELD in *Lyon v. Rood*, 12 Vt. 238, and as established by the case in Windsor county, cited by him in the case last named.

The case that is mainly relied on as establishing a contrary doctrine from that which we adopt and act upon in this case, is *Edgell v. Lowell*, before cited.

With the decision of that case, upon the facts on which the question arose, we have no dissatisfaction to express, though we think the learned judge, in drawing up the opinion, gave to the case of *Bridge v. Eggleston*, 14 Mass. 250, a force and application somewhat beyond, and aside of its real point and authority. The point in question, in the case last named, arose as to the competency of certain evidence that had been received, of admissions made by the fraudulent grantor, tending to show his fraudulent

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intent in making the sale. In discussing the propriety of receiving that evidence, the court was showing the necessity of proving the fraudulent intent of the grantor, as an indispensable element of a fraud which would be effectual to defeat the title of the grantee. No question arose or was discussed as to what would be necessary in order to render the grantee a fraudulent purchaser, nor was it of interest to any purpose of the decision accurately to define what would constitute fraud in such grantee. The remarks of the judge were general, and his language was not inconsistent with what we hold in this case. It seems obvious that he used the term *knowledge* in the sense of such knowledge as imported a concurrence in the fraudulent intent of the grantor. That no question was raised or discussion had upon this point is evident from the language of the charge, viz: "If Eggleston paid the money for the estate, and did it with a knowledge of the circumstances of the grantor, and with the intent to aid and assist him to delay or defraud his creditors, the deed would be void as against them."

Ashmun, counsel for the defendant, said in the argument that the instructions of the judge to the jury were unquestionably correct.

Now by recurring to the case of *Edgell v. Lowell*, it will be seen that the part of the charge which received the special animadversion of the supreme court, was that in which the judge told the jury "that though the grantor might have sold the farm with a corrupt and fraudulent attempt to cheat and defraud his creditors, yet if the vendee did not know it, and purchase with a like corrupt and fraudulent intent, it would not be fraudulent in him," and the impressive repetition to the jury that the vendee must be actuated by a like fraudulent and corrupt intent with the vendor. Judge BAYLIES, in the opinion was specially occupied in disproving the idea that the vendee's motives, in order to affect him with the fraud, must be identical with that of the vendor. And in so doing he says, "if the vendee, at the time, had knowledge that the vendor sold his farm to defraud his creditors, it would make the conveyance void in his hands, as to such creditors, although he had no wish to defraud them, but purchased because he considered the farm *cheap*, and this was the *only* motive that induced him to purchase;" and follows this with this language,

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"Hence I conclude that the motives and intents of the vendor and vendee may be different, and the conveyance, as it respects the vendee, will be void."

All that we understand to be meant by this is substantially what we hold in the present case, that if the vendee knows of the fraudulent intent of the vendor, and purchases, having such knowledge *only* because he considered the property cheap, although actuated by no wish to defraud the creditors of the vendor, it would of itself not be in good faith as to such creditors, would be a lending of himself to aid the perpetration of the fraud, would be purchasing in the character of a volunteer, without any adequate motive or purpose, independent of the occasion of the sale and the opportunity to buy the property cheap.

We are satisfied that this court have never understood that case, or the language of the learned Judge, in his opinion, in its application to the facts proved and the charge then under review, as having any other scope or meaning than is here indicated.

With that case fresh before them, and as we are informed, upon very full argument and consideration, the supreme court decided the case in Windsor county in the manner stated by Judge REDFIELD, in *Lyon v. Rood*, and he, in the last named case, declares the law as he does, with the approbation of his associates, who, with him then constituted the court.

Upon a somewhat thorough examination of the cases cited in the argument, we fail to find any substantial authority in opposition to the view here presented, while on the other hand, we regard many well considered cases as going farther than we design to go in this case, and as sustaining the proposition of the plaintiff's counsel that we decline to adopt.

It seems not important to extend comments upon the cases cited upon either side, and the less so for the reason that the principle which governs this case seems to be settled, and to our satisfaction, by the former decisions of our own court.

On the whole, we are satisfied that the charge of the county court was well grounded, and presented the case to the jury in a manner well calculated to hold the plaintiff to a full measure of responsibility for honesty and good faith in making the purchase of the property.

The judgment is affirmed.

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HUMPHREY PAUL v. OSCAR A. BURTON, VERNON P. NOTES
AND DAVID P. NOTES.

Book Account. Judgment. County Court. Execution. Attachment. Receptor.

The omission in a County Court writ on book account, in which the *ad damnum* is stated at one hundred dollars, to aver that the debit side of the plaintiff's account exceeds that sum will not invalidate a judgment for the plaintiff rendered without any objection from the defendant on that ground, if it appear from the whole record that the debit side of the plaintiff's account exceeded one hundred dollars.

The case of *Bates v. Downer*, 4 Vt. 178, considered and explained.

The Chittenden County Court at the November Term, 1857, on the 7th of December took a recess or adjourned, for the purpose of completing the business of its session, until the 21st of December, when it reassembled and continued its session until the 24th of the same month, when it finally adjourned. On the 7th of December an order was made by the Court that executions on judgments in trials completed might issue as of date of December 8th. *Held*, that in order to preserve the lien of attachment on personal property, it was sufficient to put the executions into the hands of the officer making the attachments at any time within thirty days after the 25th of December, and that it was immaterial in this respect whether the judgments were completed before the 7th of December or not.

An attachment of coal merely by leaving a copy in the town clerk's office, in the return of which the only description of the property attached is "*all the coal in the town of B.*" is invalid.

But still one who has receipted to the officer a definite quantity of coal which the latter has actually taken possession of under such an attachment, will be bound to return it to respond to the judgment.

TROVER for one hundred forty-five tons of coal and one hundred twenty-six and a half cords of wood. Plea the general issue, and trial by the court at the September Term, 1858, in Chittenden County,—BENNETT, J., presiding.

On trial the plaintiff introduced as evidence a receipt for the property mentioned in the declaration, described as attached by the plaintiff, as sheriff, on two writs, one in favor of *Wires & Peck v. R. Landon & Co.*, and the other in favor of the *Farmers & Mechanics' Bank v. Wm. H. Wilkins*. This receipt was dated February 12th, 1855, was signed by the defendants, and contained a valuation of the property, at eight hundred sixty dollars

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and a promise to return the same to the plaintiff on demand.

The plaintiff also introduced in evidence the record of all the proceedings in the two suits mentioned in the receipt, from which it appeared that the writ in the suit of *Wires & Peck v. R. Landon & Co.* was dated October 9th, 1854, and returnable at the November Term, 1854, of the Chittenden County Court; that it was in the common form of a writ in an action on book account, and demanded in damages one hundred dollars, and contained no allegation whatever in regard to the amount of the debtor side of the plaintiff's account.

The record further showed that this writ was served by the plaintiff as deputy sheriff, on the 10th of October, 1854, by attaching as the property of Wm. H. Wilkins, one of the firm of R. Landon & Co., "all the coal and cordwood on the wharf occupied by him in Burlington," and that this service was made by lodging a copy of the writ, with a proper return thereon, in the town clerk's office in Burlington. The suit was duly entered at the November Term, 1854, when the defendants therein were defaulted, judgment to account was rendered, and an auditor appointed, and the suit was continued from term to term until the November Term, 1857, when the auditor made a report, and judgment was rendered thereon for the plaintiffs, for ninety dollars and twenty cents damages, and eighty-four dollars and forty-eight cents costs of suit, amounting in all to one hundred seventy-four dollars and sixty-eight cents, upon which judgment an execution issued, dated December 25, 1857, which was put into the plaintiff's hands as deputy sheriff, for collection, on the 11th of January, 1858. Upon the 12th of January, 1858, the plaintiff demanded the property described in the receipt, of the defendants, and they refused to deliver it.

It further appeared by the record of the proceedings in the suit of *Wires & Peck v. R. Landon & Co.*, that the debit side of the account of the plaintiffs in that suit, which was attached to and made a part of the auditor's report, exceeded one hundred dollars. The defendants objected to the introduction of the evidence showing this fact, but the court admitted it, to which the defendants excepted.

It further appeared that at the November Term, 1857, the

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county court, after assembling at the commencement of the term, continued its session until the 7th of December, 1857, when it took a recess until the 21st of December, 1857, or as the entry on the docket expressed it, "the court for the purpose of completing the business of its session was adjourned to the 21st day of December, 1857," and at the same time the court made an order which was recorded on the docket of the court as follows:—"Dec. 7, 1857. Executions on judgments in trials completed may issue as of date of Dec. 8, 1857."

The defendants introduced evidence tending to show that the judgment in *Wires & Peck v. R. Landon & Co.*, was rendered and entered on the docket previous to the 7th of December, 1857, and the plaintiff gave evidence tending to prove the contrary, but the court held that it was immaterial whether the judgment was rendered before or after that date.

It further appeared that the court finally adjourned at the November Term, 1857, on the 24th of December, 1857.

It appeared from the record of the suit of the *Farmers & Mechanics' Bank v. Wilkins*, that the writ was dated and served October 10th, 1854; that it was returnable to the November Term, 1854, of the Chittenden County Court, and was served by the plaintiff, by lodging a copy in the town clerk's office in Burlington, with a return thereon that the plaintiff had attached all the coal in the town of Burlington. This writ was duly entered in court at the term to which it was returnable, and was continued from term to term until the November Term, 1856, when judgment was rendered for the plaintiff, for five thousand four hundred thirty-four dollars and fifty cents damages, and twenty-nine dollars and sixty-four cents costs, and an execution was issued for that sum, dated January 28, 1857, and was returned *nulla bona*, and an alias execution issued on the 11th of January, 1858, and placed in the plaintiff's hands on that day for collection. This execution was in the plaintiff's hands on the 12th of January, 1858, when the property described in the receipt was demanded by him of the defendants.

The final adjournment of the court, at the November Term, 1856, was on the 27th day of January, 1857.

The plaintiff testified that he served the writs in the cases of

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Wires & Peck v. R. Landon & Co., and *Farmers & Mechanics' Bank v. Wilkins*, by lodging copies in the town clerk's office, on the same day, as appeared by his returns thereon, but that he served the former fifteen minutes previous to the latter, and that he took possession of the property described in the receipt under the attachment by virtue of those writs, and held it under such attachments until the execution of the receipt; and so the court found to be the fact.

Upon this evidence the defendants claimed first that the judgment in the case of *Wires & Peck v. R. Landon & Co.* was entirely void, because the *ad damnum* in the writ was only one hundred dollars, and the writ contained no allegation that the debit side of the plaintiff's account exceeded that sum, and therefore that no lien on the property described in the receipt was created thereby; second that the execution in that case should have been taken out within thirty days after the 8th of December, 1857, in order to preserve the lien on the property attached upon the writ; and third, that the attachment in the case of *The Farmers & Mechanics' Bank v. Wilkins* was invalid.

But the court decided against the defendants upon all these points, and rendered judgment for the plaintiff for the value of the coal mentioned in the receipt, with interest from the time of the demand thereof, made by the plaintiff of the defendants, and also for the amount of the judgment in favor of *Wires & Peck v. R. Landon & Co.*, with interest from the time the same was rendered.

To this judgment the defendants excepted.

L. E. Chittenden and Asahel Peck, for the defendants.

1. The action in favor of *Wires & Peck v. R. Landon & Co.* was not within the jurisdiction of the county court, because the *ad damnum* in the writ was only one hundred dollars, and the writ contained no allegation that the debtor side of the plaintiff's book exceeded that sum.

All the facts necessary to give the court jurisdiction to entertain a civil action must be set forth in the writ and declaration, and when the record shows a case affirmatively without the juris-

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diction of the court in which the action is brought, the whole proceedings are *coram non judice* and void.

The evidence that the auditor's report showed that the debtor side of the plaintiff's book exceeded one hundred dollars, was not admissible. The jurisdiction of a court cannot be made to depend upon the fact that the record discloses that such a state of facts was proved as to warrant the exercise of its authority. *Sheldon v. Newton*, 23 Ohio 499; *Bates v. Downer*, 4 Vt. 178; *State v. Richmond*, 6 Foster 232; *Chemung Bank v. Judson*, 4 Selden 254.

2. The county court erred in holding that it was immaterial whether the judgment in *Wires & Peck v. Landon & Co.* was rendered and perfected before the adjournment of the court on the 7th of December, 1857. The county court has the power by statute to hold an adjourned session. Comp. Stat. p. 222, sec. 27. The judgment having been perfected and completed before the adjournment, the plaintiffs in the suit of *Wires & Peck v. R. Landon & Co.* were entitled to their execution by law without the leave of the court. The adjourned term is not for this purpose a continuation of the former term, but a new term, as was directly held in the case of *Hoar v. Commissioners of Jail Delivery*, 2 Vt. 402. The execution therefore in *Wires & Peck v. Landon & Co.* issued too late to preserve the lien on the property.

8. The attachment on the writ in favor of *The Farmers' & Mechanics' Bank v. Wilkins*, of "all the coal in the town of Burlington," without referring to its locality, quantity, quality or situation, or stating in whose possession it was, was entirely void and created no lien on the property. The return is entirely too vague. Drake on Attachments, sec. 198.

Wm. G. Shaw, for the plaintiff.

1. a. The suit of *Wires & Peck v. R. Landon & Co.* was actually within the jurisdiction of the county court. If any defect existed in the writ, it was one merely relating to the form of declaring; merely an omission to state that the debit side of the plaintiff's book exceeded one hundred dollars. An omission of this kind is aided by verdict and judgment, and does not render

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the judgment void. The presumption is after judgment, either that the defendants waived the objection, or that the court allowed an amendment of the writ. *Newcomb v. Peck*, 17 Vt. 302; *Hammond v. Wilder*, 25 Vt. 342; *Eaton v. Houghton*, 1 Aikens 880.

b. Every judgment of a superior court of general jurisdiction, like our county court, is presumed to be valid until it is set aside by motion in arrest or writ of error or some other proceeding, operating directly and solely upon the judgment itself. The validity of such a judgment cannot be impeached, collaterally. *Prigg v. Adams*, 2 Salk. 674; *Allen v. Huntington*, 2 Aik. 249; *Walbridge v. Hall*, 3 Vt. 114; *Blanchard v. Goss*, 2 N. H. 491; *Brown v. Atwell*, 31 Maine 351; *Drew v. Livermore*, 40 Maine 266; *Adams v. Jeffries*, 12 Ohio 271; *Ex parte Watkins*, 3 Pet. 193; *McCormick v. Sullivant*, 10 Wheat. 192; *Chemung Bank v. Judson*, 4 Selden, 254.

2. The whole testimony in regard to the particular time in the November Term, 1854, when the judgment in the case of *Wires & Peck v. R. Landon & Co.* was rendered, was entirely immaterial, and was properly disregarded by the court. The statute is explicit on this point. Sec. 83, chap. 21, p. 253 of the Comp. Stat. provides that personal property must be taken in execution within thirty days from the time of rendering final judgment in order to preserve the lien gained by attachment.

Sec. 84 of the same chapter provides that the day on which the plaintiff shall first by law, *without leave of the court*, be entitled to an execution on a judgment rendered in his favor shall be deemed the time of rendering such judgment in all cases, so far as relates to holding property attached on mesne process.

Sec. 81 provides that no execution shall issue on any judgment rendered by the supreme or county courts, until twenty-four hours after the rising of the court, unless by special permission of such court. Hence the time when the thirty days' begin to run must be the day after the final rising of the court and none other.

3. As to the attachment of the coal in the suit of the *Farmers' & Mechanics' Bank v. Wilkins*:

a. The defendants, being receiptors, are estopped from denying that the coal in question was attached. They have expressly admitted that fact in the receipt. A receiptor cannot deny either

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that the property described in the receipt was attached, that the officer had possession of it under the attachment, that he received it from the officer, or that the property was attachable. Drake on Attachments, sec. 349; *Brown v. Atwell*, 31 Maine 351; *Spencer v. Williams*, 2 Vt. 209; *Lowry v. Cady*, 4 Vt. 505; *Morrison v. Blodgett*, 8 N. H. 238; *Jewett v. Torrey*, 11 Mass. 219; *Drew v. Livermore*, 40 Maine 466.

b. But even if the attachment was in the first instance too vague, and would have remained so, had the officer done nothing more than leave the copy in the town clerk's office; still the subsequent acts of the officer in actually taking possession and retaining control of the coal in question, removed all vagueness or objection on that account. The description in the return is certainly comprehensive enough to include the coal described in the receipt; there is no contradiction between the description in the return and that in the receipt. The taking possession of the coal by the officer, and retaining the control thereof, were positive and notorious acts, and rendered the leaving of a copy at the town clerk's office unnecessary; and as the coal in question is shown in the officer's possession under the attachment, and is with an easy and natural intendment included within the description in the return, it is too late now, after judgment, to object to the insufficiency or vagueness of the return. *Fletcher v. Cole*, 26 Vt. 170.

PIERPOINT J. The first question raised by the defendants is, as to the validity of the judgment in favor of *Wires & Peck v. R. Landon & Co.*, under the proceedings in which the property was attached.

The suit was brought originally in the county court, the plaintiff there claiming in damages only one hundred dollars, there being no allegation in the writ or declaration, as to the amount of the debtor side of the plaintiff's account; but no motion to dismiss or objection was made to the proceeding on that account. The matter was referred to an auditor, who made his report of the accounts of the parties, and the balance which he found due. From this report as now of record, it appears that the debtor side of the plaintiff's account did exceed one hundred dollars.

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On the report of the auditor, the county court rendered judgment for the plaintiffs. It is insisted by the defendants here, on the authority of *Bates v. Downer*, 4 Vt. 178, that this judgment was void for the above cause, and that the defect cannot be aided by anything that subsequently appears in the record of the proceedings.

In the case of *Bates v. Downer*, the question was raised on a motion to dismiss. The plaintiff offered evidence to show that the debtor side of his account exceeded one hundred dollars. This evidence was rejected. No exception appears to have been taken to that ruling, and no notice is taken of it in the decision. It is not perfectly obvious on what ground the evidence was rejected, inasmuch as the jurisdiction is not made to depend on the amount of the *ad damnum*, the balance due, or upon any fact that it is necessary for the plaintiff to allege in order to show his cause of action. The question of jurisdiction in actions on book often depends upon the proof; if the party *claims* over one hundred dollars, that does not give the court jurisdiction, if the proof shows the debtor side of his account to be less. If the proof of the debtor side of the account will oust the jurisdiction, why will it not confer it, inasmuch as the jurisdiction is by statute made to depend solely upon that? The proof was not offered to contradict any allegation in the writ, neither was it inconsistent with anything in it. It is conceded that the plaintiff was not bound to claim any more than was actually due, but that he should have alleged that the debtor side of his account was more than one hundred dollars. The omission of that fact was a defect in the pleading, but the jurisdiction does not depend upon that, but upon the amount of the account, and when it can be made to appear that that is within the jurisdiction of the court, so that they in fact have jurisdiction of the subject matter and of the parties, what practical or legal objection can there be to the court permitting an amendment of the declaration by an insertion of the necessary allegations, inasmuch as the jurisdiction is not made to depend upon its existence in the declaration, but upon its truth; and if the amendments were made, and it afterwards turns out in proof that the allegation is not true, the court still has no jurisdiction.

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If this be so, then it would seem that after the case had been permitted to proceed to final judgment, such defect in the declaration ought not to render the judgment void, when upon an inspection of the whole record, it does appear affirmatively, that the court rendering the judgment had actual jurisdiction of the parties, and of the subject matter.

If, upon the face of the writ and declaration, it had appeared affirmatively, that the case was without the jurisdiction of the court, it might have merited a different consideration.

We are inclined therefore to think the judgment in this case is not to be held void, even though the court might have dismissed the suit, if a motion for that purpose had been made, as in *Bates v. Downer*.

It is next claimed that *Wires & Peck* did not take out their executions, and charge the property attached upon their writ within thirty days from the time their judgment was rendered. It appears that the execution was put into the hands of the officer on the 11th of January, 1858. It also appears that the November Term of the Chittenden county court, in 1857, at which the judgment was rendered, continued its session until the 7th of December, 1857, when it took a recess, or adjourned to the 21st of December for the purpose of completing the business of the session. The court finally adjourned on the 24th of December, 1857. It is insisted that the regular term of the court closed on the 7th of December; and that at the expiration of twenty-four hours thereafter the party was entitled to his execution, and not having issued it within thirty-days thereafter, the property was discharged.

Was the term of the court on the 7th of December so closed and completed that its subsequent session on the 21st is to be regarded as an adjourned term of said court, within the meaning of the statute authorizing an adjournment? We think it was not. It can be regarded only as a suspension of the business of the term for a definite period, adopted from considerations of convenience, and for the purpose of completing the business of the session, without any intention on the part of the court of making it an adjourned term, separate and distinct from the regular term, when parties, attorneys, clerk and court would be entitled to tax

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costs, as for a separate and distinct term. Authority to do so is given by the statute, but the facts presented by this case, we think do not show an exercise, or an attempt to exercise, any such authority; it can be regarded only as a recess, such as occurs at almost every term of our county courts for longer or shorter periods.

That the county court so regarded it, is apparent from the fact that they felt it necessary or proper to make an order in relation to the issuing of executions, which would have been wholly unnecessary if they had regarded the regular business of the term as closed.

The question then arises as to the effect of such order. The statute provides that the day on which the plaintiff shall first, *by law without leave of the court*, be entitled to an execution on any judgment, shall be deemed the time of rendering such judgment in all cases so far as relates to holding property attached, &c. If the plaintiff in that judgment was entitled to an execution before the final adjournment of the court, it must have been by virtue of the leave of the court granted for that purpose, and not by virtue of law, as the statute declares that executions shall not issue until twenty-four hours after the rising of the court, unless by special permission of such court. And although the order of the court may have authorized the party to take out his execution at an earlier day, still his lien upon the property would continue until the expiration of the thirty days from the day after the rising of the court, and the lien of any subsequent attaching creditor is to be ascertained by computing from the same period; so that the execution in this case was issued in season to charge the property.

But it is further insisted that no lien was created on the coal in controversy by the plaintiff on the writ in favor of the *Farmers & Mechanics' Bank v. Wilkins*.

So far as an attempt was made by the plaintiff to attach the coal in question, by leaving a copy of the writ in the town clerk's office, with a return thereon that he had attached all the coal in the town of Burlington, without anything further to indicate the quantity, the kind or locality of the coal, we think it altogether insufficient to create any lien whatever, and if this were all there

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was to sustain the plaintiff's claim to recover for the coal, it is very clear that the judgment of the court below allowing that claim should be reversed. The case, however, shows that the plaintiff did not rely upon the attachment by leaving a copy in the town clerk's office, but immediately took possession of the coal and retained it under the process until the defendants executed their receipt to him therefor, on the 12th of February, 1858.

This, we think, brings the case clearly within the principle established in *Fletcher v. Cole*, 26 Vt. 170. and was sufficient to constitute a valid attachment; at all events, it is sufficient to make the officer liable to the creditor for the property, and to enable him to maintain this action against the receiptors, to whom he delivered the property, and who agreed to return it to him on demand.

The fact that Burton purchased the property from Wilkins cannot avail him here; he bought it knowing of the attachment, and that the plaintiff held the property in his possession by virtue of it; all this appears on the face of the receipt itself.

The judgment of the county court is affirmed.

THE STATE OF VERMONT v. PATRICK DENNIN.

Criminal law. Evidence.

In an indictment under the 4th section of chap. 104, page 545 of the Compiled Statutes,* it is not necessary to a conviction that any portion of the building should be actually burned. It is sufficient if fire be applied to or in immediate contact with the building, with the intent to burn it, though such intent be not carried out.

On the trial of an indictment for a crime, the respondent, to weaken the force of the evidence of certain witnesses who had testified to his identity with the criminal, introduced evidence tending to show that at a preliminary examination of the respondent they testified less positively on that point; but it also appeared that the same witnesses, directly after the commission

* Which provides that "if any person shall wilfully and maliciously set fire, with intent to burn, to the dwelling house, etc., etc., of another, * * * he shall be punished, etc., etc."

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of the offence, asserted positively the identity of the respondent with the person whom they saw commit the offence, and at the same time caused his arrest; *Held*, that such statements and action on the part of the witnesses, so near the time of the commission of the offence, tended to corroborate their testimony as to identity.

INDICTMENT under the fourth section of chapter 104, Comp. Stat., for setting fire to a barn with intent to burn the same. Plea, not guilty, and trial by jury, at the March Term, 1858, in Rutland county,—ALDIS, J., presiding.

To sustain the indictment the State produced one Campbell as a witness, who testified that he had charge of the barn in question; that in the evening of the 8th of May, 1857, he saw the respondent pass through the driveway to the barn, and go behind a large wagon under the shed, come out from behind the wagon and pass into the barn; that he then thought it was the respondent, and that he (the respondent) was going into the barn to commit a nuisance; that the witness who was then standing a short distance from the front door of the barn, went to the door and shut it in a minute or two after he saw the respondent go in, so the respondent could not get out of that door; that he then returned to where he had been standing, and again in a minute or two came back and opened the door, and with a lantern went into the barn, expecting to find the respondent and intending to reprimand him for using the barn for the purpose for which he supposed he had entered it; that he went in and passed from the door to the further end of the barn and then back to the door, but could not see any one in the barn below; that observing a side door (on the south side of the barn) near the stairs to be open he shut it, and then went to work at the front end of the barn; that in about a minute and a half or two minutes he heard the side door of the barn rattle, and as it could be opened only from the inside, and as the witness supposed that the respondent had stepped out at that door and was trying to get in, he went there to let him in; that upon getting to the foot of the stairs near the side door, he saw a light in the hay loft and that the side door was open, that a fire was blazing in the hay and straw near the head of the stairs; that the witness ran up stairs and extinguished the flames which were two or three feet high, and then ran back to the front door and called to one Bryant to come and

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put out what was left of the fire, while he went out at the side door to look for the person who he supposed had set the fire, but on going out at that door into the back yard he was unable to see or find any one there ; that the witness was well acquainted with the respondent and was positive that it was the respondent he saw pass into the barn ; that he saw no other person go into the barn, knew of no other person's being in the barn, and did not see any one come out of the barn after the respondent went in.

The State also produced one Bryant as a witness, who testified that he was sitting in the driveway to this barn and saw the respondent come into the driveway ; that the respondent was going towards the door of the barn, that he passed within eight feet of the witness and went behind a large wagon under the shed ; that the witness saw no more of him ; that in about five minutes afterwards, the hostler, Campbell, called to him and said that the barn was on fire ; that the witness, Bryant, went into the barn and up stairs and put out the fire that was in the hay on the floor ; that he was well acquainted with the respondent and was positive that it was the respondent he saw go behind the wagon, and that he saw his face.

On the part of the defence evidence was introduced tending to show that Bryant and Campbell, when examined before the justice, at the time the respondent was bound over for trial, did not swear so positively that the person they saw go behind the wagon and into the barn was the respondent, as they did upon this trial ; and particularly that Bryant said at the preliminary examination that he did not see the face of the person who went behind the wagon, but thought it was the respondent from his dress, form and gait.

It further appeared from the testimony of Campbell and Bryant, that immediately after the fire they informed the owner of the barn and others that the fire had been set, and what they had seen of the respondent going towards and into the barn, and of the circumstances connected therewith, and that within an hour after the fire was set they procured the arrest of the respondent.

It also appeared that the hay, straw and chaff were about two inches deep on the floor of the loft where the fire was found, and

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that some bunches of matches partly consumed were found there. There was evidence tending to show that a circular place in the hay, straw and chaff, in diameter about the size of a bushel basket, was burnt, but that no part of the floor or of the building was burnt or even charred, but that a spot on the floor was blackened.

The court charged the jury that in order to convict the respondent it was necessary to prove that, with a willful and malicious intent to burn the barn, he set fire to the hay, straw and chaff on the floor of the loft in the barn; but that no actual burning whatever of the floor of the barn or of any part of the building was necessary in order to sustain the indictment; that if the respondent with such willful and malicious intent set fire to the hay, straw and chaff on the floor of the loft in the barn, it was a "setting fire, with intent to burn, to the barn," though the fire was put out before any part whatever of the woodwork of the barn was burned.

The court further charged the jury, in regard to the testimony of Campbell and Bryant and the evidence to discredit them, that the fact that Campbell and Bryant acted upon their belief and knowledge that the person they saw was the respondent and caused him to be arrested within an hour after the fire was set, tended to corroborate their testimony as to identifying him.

The respondent excepted to that portion of the charge of the court in which the jury were told that no actual burning whatever of the floor of the barn or of any part of the building was necessary in order to sustain the indictment, and also to the charge in regard to the testimony of Campbell and Bryant.

Martin G. Everts, for the respondent, claimed that the indictment could not be sustained without proving an actual burning of some part of the barn, and cited Wharton's Crim. Law 1662; 41 Eng. Com. Law 295; 38 *Id.* 29; 5 Cushing 427; *Sarah Taylor's case*, 1 Leach 51; Hawkins P. C. 166; 2 East's Crim. Law 1020; 3 Chitty's Crim. Law 1120; Roscoe's Crim. Ev. 274; Arch. Crim. PL 374; 16 Mass. 105.

A. A. Nicholson, State's attorney, with whom was *E. N. Briggs*, for the prosecution.

The offence prohibited by the statute on which this indictment is

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founded, is the setting on fire *with intent to burn*, and not an *actual burning*. All the authorities cited by the defence in which the doctrine is laid down that an *actual burning* is necessary to constitute the offence, have reference to the crime of *arson*, and not to the offence created by this statute. It is evident that the legislature intended to make it a crime to set a fire *with intent to burn*, thus constituting an offence different from *arson*.

POLAND, J. The main question in this case is, whether there can be a legal conviction under the 4th section of chapter 104 of the Compiled Statutes for an attempt to commit the crime of *arson*, without an actual burning of some portion of the building.

The words of the section are, "If any person shall willfully and maliciously set fire, with intent to burn, to the dwelling house of another, or any outbuildings adjoining thereto, or to any other building, etc."

The defendant's counsel insist that under this statute no attempt to burn a house or other building, however deliberate or formidable, constitutes the offence provided against, unless the building be actually set on fire and some part of it burned; and several adjudged cases in England, and the language of several respectable elementary writers on criminal law, are relied on to support this view.

Arson, at common law, consisted in the willful and malicious burning of the house, or outbuildings adjoining thereto, of another; or, as Mr. Chitty defines it, the house or barn of another. To constitute the offence there must be an actual burning of some portion of the building, but it was not necessary that the building should be wholly consumed; if any portion of the building was burned the offence was complete.

Various statutes were enacted in England, at an early period, extending the offence of *arson* to other buildings and property than those included within the common law definition, and also modifying the punishment, and especially to limit or extend benefit of clergy to that class of offences.

In all these statutes prior to that of the 9th of GEO. 1st, so far as I have examined them, the words *burn*, or *cause to be burned*, are used in describing the offence.

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The act of 9 GEO. 1., chap. 22, which was passed to extend the punishment for arson to cases of rescue of any person in lawful custody for that offence, and for hiring any person to aid in committing it, and also to take away benefit of clergy from the offence, known in its day in England as the "*Black Act*," first used the words *set fire to*: "If any person or persons shall set fire to any house, etc."

After the passage of this act questions arose in indictments under it whether this change of language had really changed the nature of the offence, and whether it was still necessary to prove an actual burning in order to make the offence complete. The judges held that even under this statute an actual burning must be proved, because they said this statute was not intended to alter the nature of the crime, or constitute any new offence, but that its object was to exclude the principal offender from his clergy more clearly than he was before; see *Taylor's case*, Leach's Crown Cases 51; *Spalding's case*, Leach's Crown Cases 217; *Breeme's case*, Leach's Crown Cases 219; 1 Hawk. P. C. 166; 2 East's Crown Law 1020.

Since the act of 9 GEO. 1, the English statutes upon the subject of arson, extending the subjects of it and modifying the penalty, have generally used the words *set fire to*, instead of the words *burn*, or *cause to be burned*, and they have always received the same construction as under the act of 9 GEO. 1, and it has never been suggested that any new offence was intended to be created, or that the mere attempt to commit arson was thereby provided against.

It is not denied by the counsel for the defendant that the legislature, by the act of 1844, (sec. 4, chap. 104, Comp. Stat.,) intended to punish the mere unsuccessful attempt to commit the crime of arson, but they insist that the language used is so legally inappropriate and insufficient to that end that the design failed, and they succeeded only in re-enacting the existing statutes punishing arson itself.

In the first place they allege that the operative words of the act itself, *set fire to*, by their own natural and inherent signification, mean the same as *burn* or *set on fire*, and that to give them any less signification is to force them out of their natural office.

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But it seems to us that this claim as to the natural force and meaning of the words cannot be sustained, and that though the words may perhaps, without forced construction, well enough be so understood, still that they may as reasonably and fairly be understood the same as *put fire to*, or *place fire upon*, or *against*, or *put fire in connection with*, and that, especially when those words are used in connection with other words clearly showing that they are used in this latter sense, they may bear such meaning without the least violence to their natural import.

But if this be so, it is urged that these words have received a legal meaning, by a long course of judicial decision and construction, so firmly fixed and settled that when used in a statute it should be intended they were used in that sense, even if their natural meaning were different in the connection in which they are used.

The general principle is quite familiar and settled, that where the legislature copy and enact here an existing English statute, or one from one of the United States, which statute has a settled judicial interpretation that is ordinarily understood, we adopt that interpretation with the statute.

But this is not commonly true of all the language used in a statute, and can hardly be true of any particular word, or set of words, except such as are mere technical legal words and phrases. It is often the case that the precise meaning of words is made to vary by the connection in which they are used, and the evident purpose and object of the enactment itself.

The English judges appear to have felt somewhat embarrassed in saying that the words *set fire to*, in the 9th of GEO. 1, meant the same as *burn*, or *caused to be burned*, in the previous statutes, and by the common law, but they justified it by saying that evidently the statute did not intend to change the nature of the offence, but was passed for a wholly different purpose.

Mr. East, an early writer on criminal law, after saying that an actual burning must be proved to constitute arson, goes on to say, "the statute of 9 GEO. 1, chap. 22, does indeed, in enacting the felony, make use of the words *set fire to*, but I am not aware of any decision which has put a larger construction on these words than prevails by the rule of the common law, and

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the contrary opinion may be collected from what is said in Spalding's case, and Breeme's case, and in the case of Sarah Taylor." Our statute of 1844, though it contains the words *set fire to*, is not a copy of any English statute, not even in substance, and contains very important qualifying words contained in no English statute. While all the English acts where these words are used seem evidently passed for the purpose of extending the limits or changing the penalty of the crime of arson, our statute was confessedly enacted to punish the act of attempting to commit arson, where arson was not in fact committed.

Our statute contains the important qualifying words "*with intent to burn*," which are not contained in any of the English statutes, most clearly implying that the offence intended to be covered by the statute was something short of an actual burning. The opposite construction would make the statute read, "If any person shall willfully and maliciously *burn, with intent to burn*, any house, etc." It is conceded also that the construction claimed for these words would render the act of 1844 wholly nugatory, and neither add to nor in the slightest particular affect the existing law of the State. The legislature had many years before extended the crime of arson to the burning of every species of building and property named in the act of 1844, and the penalties imposed by the latter act are in the very words of the existing statutes against arson, so that the statute is to be wholly rejected or have such effect and operation given to it as the legislature clearly intended it should receive. In the construction of statutes, as in the construction of mere private instruments and writings, the great and leading rule is, what was the intention of those using the language as shown by the language used, and this intent is to prevail if it can be done without violence to the language used.

Statutes, like all other written documents, are to be construed so as to give effect to all the language used, if it can reasonably be done, and this applies as well to penal statutes as to any others.

So it is a well established rule in the construction of a statute that it is to be construed as it was supposed to be enacted, in reference to and in the light of all the existing statutes upon the

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same subject, and to be so construed in connection with them that all may have effect and force if possible. The same rule is expressed in the old books, that in construing a new statute, the old law, the mischief, and the remedy are all to be considered.

We are fully mindful of the established rule of law as to the construction of penal statutes; that they are to be construed strictly, and that a crime is not to be created by any forced construction of language, but that it must fairly come within the words, as well as within the intent and spirit of the statute, but at the same time, this rule, in modern times at least, does not require an abandonment of the usual and ordinary rules of construction and common sense. Looking to the language of the statute itself, the already existing statutes on that subject, the evident purpose and object of the statute as to the mischief intended to be remedied, we do not feel doubtful of the construction to be given to the statute, and believe that it was correctly construed by the court below. The language used in the statute we think was chosen with care to avoid the very objections which are now made to this construction of the act, and that every word is effective and operative. They intended to punish the mere attempt to commit arson though not in fact committed, but if they provided generally against such attempts, great doubt and uncertainty might arise as to what constituted such attempt; the most remote and distant preparation might perhaps be deemed enough. They therefore provided merely against the actual application of fire itself. The word *to* in the statute (on which the argument of the defence is mainly hung, and which it is claimed is wholly thrown out by our construction,) we think was used with purpose and effect also. It is now urged that men may be indicted and convicted for setting fires, with intent to burn buildings, though set at ever so great a distance therefrom, and that doubt and danger will arise from that source. We think this very difficulty was purposely guarded against by the use of the word *to*, that is, fire must not only be applied, but directly *to*, or in immediate contact with the building, and not at a distance, though it thereby was designed to burn it.

In our opinion this statute, instead of being regarded as wholly unmeaning, may have effect, and sensible effect, given to every

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part of it, so that it can stand sensibly with other statutes on the same subject, and fully carry out the intent of the legislature, and at the same time have no violence done to its words, or to any rule of law, governing the construction of penal statutes.

The cases cited from Mass. we think have no bearing, for their statutes are wholly in reference to the crime of arson, and the act of 1804, under which the case of *Comm. v. Van Schaack*, 16 Mass. 195, arose, and in which the words *set fire to* are used, goes on and adds "and by the kindling of such fire such house shall be burnt, etc." The court in that case say, "the statute has left the burning to be defined by the common law, and by that, if any part of a dwelling house, however small, be consumed by the fire, the offence is complete, and so is within the statute."

The respondent also objects to the charge of the court in reference to the testimony of Campbell and Bryant.

Those witnesses had testified to seeing the respondent go into the barn just before the appearance of the fire, and professed to have known and recognized him at the time, and the case evidently rested mainly upon the strength and validity of their identification of the respondent.

The respondent, to weaken this, had given evidence tending to show that these witnesses, at the examination of the respondent immediately after the fire, had testified less confidently as to their ability to identify the respondent than they had at the trial. In their examination it had come out without objection that they immediately communicated what they saw of the defendant before they had time to deliberate or calculate upon the subject, and that they in fact caused the immediate arrest of the respondent, without any other cause or ground that appears, except what they saw themselves. The evidence given by the respondent had a tendency to establish that these witnesses had been operated upon by some influence to strengthen their testimony, and to show that really, at the time of the transaction, they did not recognize the respondent as fully as they now professed to have done. Now it seems to us that the fact that at the very moment of the transaction they professed to recognize him, and acted upon that belief, and caused the respondent to be arrested, did naturally and reasonably tend to increase the credit to be given to their testimony as to

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identity, and to rebut the effect of the evidence as to their inability to recognize him given by the respondent, and that therefore the suggestion to the jury on this subject was legitimate and proper. The respondent's exceptions are therefore overruled.

BENNETT, J., dissented.

SALLY AUSTIN v. ELI CHITTENDEN.

Pleading.

The third section of the act of 1856,* which provides that "the party against whom matter is specially pleaded in confession and avoidance in answer to matter by him antecedently alleged, may by a general form of denial traverse and put in issue all the material facts so pleaded by the other party," is sufficiently complied with in an action of assumpsit by a denial of all the allegations of the plea in the same words in which they are pleaded.

Such a denial only puts in issue the material facts pleaded by the other party, the same as when the general issue is pleaded to a declaration.

ASSUMPSIT. The plaintiff's second count declared in the common form on a note executed by John Bradley and indorsed by the defendant, the payee, to the plaintiff.

The defendant's fourth plea was as follows :

" And for a further plea in this behalf as to the second count in said declaration, the said defendant says that the said plaintiff ought not to have or maintain her aforesaid action thereof against him, because he says that after the making of the promise in the said second count mentioned, to wit, on the first day of May, 1854, at said Burlington, in consideration that the said John Bradley would and did then and there give and deliver to the said plaintiff a certain other promissory note made by said John Bradley, and payable to the order of, and then and there endorsed by one Harry Bradley, for a certain sum of money therein mentioned, larger than the amount of said note in said

* See acts of 1856, No. 8, page 14, sec. 3.

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second count mentioned, with the interest then accrued thereon, to wit, for the sum of four thousand seven hundred eighty-six 15-100 dollars, and payable at a certain time thereafter in said note specified, to wit, in four months thereafter, said note to be collateral to said note in said second count mentioned, (among other things) the said plaintiff then and there promised the said makers of said note in said second count mentioned to forbear the prosecution and collection of said note in said second count mentioned, until the said note of the said John Bradley, so indorsed as aforesaid, should fall due and become payable according to the tenor of the same as aforesaid.

And the said defendant further avers, that the said plaintiff did thereupon so forbear as aforesaid promised, to wit, at said Burlington..

And the said defendant further avers that he, at the time of the making of said note, in said second count mentioned, and of the indorsement thereof, and the delivery thereof to the said plaintiff, was and ever since has been a mere surety of and accommodation indorser for said maker of said notes in said second count mentioned, and that he never received nor had any consideration for his said indorsement thereof. Of all which the said plaintiff at the time of said delivery of said note to her, and before and at the time of making the said promise to forbear thereon as aforesaid, had notice, to wit, on the day and year aforesaid, at said Burlington. And this, the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought to have or maintain her aforesaid action thereof against him."

To this plea the plaintiff replied as follows :

" And the said plaintiff, as to the said plea of the said defendant, by him fourthly above pleaded, says that by reason of anything in that plea alleged, she ought not to be barred from having and maintaining her aforesaid action thereof against him, the said defendant, because (according to the form of the statute in such case provided,) she says that she, the said plaintiff, did not in consideration that said John Bradley would and did deliver and give to her the note of said John Bradley, dated the first of May, 1854, for 4786 15-100 dollars, payable in four months after

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date to the order of Harry Bradley, and by him indorsed, (or any other note,) promise the makers of said note in said second count mentioned, to forbear the prosecution of said note in said second count mentioned, until such note of said John Bradley should fall due and become payable according to the tenor thereof, nor did the said plaintiff so forbear. Nor was said defendant a surty of and accommodation indorser for the makers of said note, nor did the said plaintiff have notice that the defendant was surety and accommodation indorser for said makers, in manner and form as the said defendant hath in his said plea alleged, and this she prays may be inquired of by the country."

To this replication the defendant demurred specially. The causes of demurrer sufficiently appear from the opinion of the court.

The county court, at the September Term, 1858, in Chittenden county,—BENNETT, J. presiding,—adjudged the replication insufficient, to which the plaintiff excepted.

J. French and E. R. Hard, for the plaintiff.

Geo. F. Edmunds, for the defendant.

PIERPOINT, J. The questions in this case arise upon a demurrer to the plaintiff's replication to the defendant's plea.

The replication was filed under and in pursuance of the statute passed in 1856, relating to proceedings and costs in suits at law. And the first question that naturally arises is as to the sufficiency of this replication under that statute.

The statute provides that "the party against whom matter is specially pleaded in confession and avoidance in answer to matter by him antecedently alleged, may by a *general form of denial* traverse and put in issue all the material facts so pleaded by the other party."

It was the intent of the legislature by this enactment to entirely change the common law rule of pleading in respect to the matters referred to, so that the party would not be compelled to confine himself to a denial of a single material fact that his adversary had alleged against him, as at common law, but might by denying all such facts put his adversary to the proof of them.

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In short, the party is allowed practically to tender a general issue to a plea, replication, etc., in the same manner that it may be done to the declaration, and when so tendered, we apprehend it should be construed to have the same legal effect, that is, to put his adversary to the proof of all the allegations that are necessary to be established to sustain the claim which he sets forth in his pleading.

In the case before us, the replication denies the allegations of the plea substantially in the same words in which they are pleaded. It is insisted that by so doing the plaintiff puts the defendant to the proof of immaterial matter, that he would not be required to prove under a more general form of denial. This we think is not correct. The party who, under this statute, confines himself strictly to a denial of the facts alleged in the manner and form in which they are pleaded, only puts in issue the material allegations, and under an issue so formed the alleging party is required to prove his allegations in the same manner and to the same extent that he would be required to prove them if they were contained in a declaration to which the general issue was pleaded.

But it is further insisted that the replication in this case is too special and particular in the form and extent of its denial to be allowed under the statute.

The statute allows a general form of denial, but gives no form and refers to no form, and the court cannot by construction limit the proceedings to any particular form, as there are no forms new known to the law that are applicable to all cases that may arise under the statute. In cases where from the form of the action and the state of the pleadings, *de injuria* would be appropriate, that plea might answer all the purposes of the statute; but that form of pleading is generally applicable only in actions *ex delicto* and as a replication to a plea, whereas the statute covers all forms of action and every stage of the pleadings.

If the form of denial adopted in the present case were adopted as the denial of a declaration, it would be objectionable as being what may be called a *special* general issue, not upon the ground that it in any measure would tend to embarrass the pro-

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ceedings, or that it would place the parties in any different position from that which they would occupy under a plea of the general issue in the usual form, but for the reason, as given by Judge GOULD, that to allow it would lead to innovation and confusion, and tend to destroy settled distinctions, and to the introduction of new pleas unknown to the law.

But it must be borne in mind that the form of a general denial of the declaration has been long established in all forms of action and the propriety of requiring parties to conform to them for the reason stated is obvious to all.

But here the innovation upon the rules of pleading is introduced by the legislature for wise and beneficial purposes, and the law furnishes no particular form of denial applicable to the accomplishment of those purposes. There is no rule of law requiring the pleader to follow any particular form; indeed I apprehend it would be somewhat difficult to frame a form of denial that would always be applicable in all stages of the pleading. And although the replication in this case would seem to be unnecessarily prolix, inasmuch as it recites the form of the allegations which it denies, instead of denying them in the form alleged, referring to the plea for the form; still as under the construction which we have already put upon it, the same result follows practically, we are inclined to hold it good under the statute. This view renders it unnecessary to pass upon the other question in the case.

The judgment of the county court is reversed.

THE STATE OF VERMONT v. THEODORE A. PECK.

Jurisdiction of a justice of the peace in prosecutions for selling intoxicating liquor.

A justice of the peace has no jurisdiction to try a prosecution under the ninth section of the act of 1852, for being a common seller of intoxicating liquor.

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But the joinder of a count for being a common seller with other counts for selling intoxicating liquor in specific instances, in a complaint before a justice of the peace, will not render the whole complaint defective. The justice may try the respondent upon the counts within his jurisdiction to try, and examine and in his discretion discharge or bind him over to the county court upon the count for being a common seller.

APPEAL from the judgment of a justice of the peace in a prosecution for a violation of the law of 1852, prohibiting the sale of intoxicating liquors.

The first count in the complaint was for selling, the second for furnishing, and the third for giving away intoxicating liquor contrary to law. The fourth count was for being a common seller of intoxicating liquor, and the fifth for owning, keeping and possessing intoxicating liquor with intent to sell the same contrary to law.

The record of the proceedings before the justice showed that he found the respondent guilty of thirty-three offences under the first count, and that a fine was imposed therefor. There was no record of any adjudication whatever upon the remaining counts of the complaint.

In the county court the respondent demurred to the complaint, but the court, at the March Term, 1858, in Chittenden county,—BENNETT, J. presiding,—overruled the demurrer, and adjudged the complaint sufficient, to which the respondent excepted.

Geo. F. Edmunds, for the respondent.

E. B. Hard, State's Attorney, for the prosecution.

REDFIELD, Ch. J. I. In regard to the question whether a justice of the peace has jurisdiction to try the offence of being a common seller of intoxicating liquor, we all agree that it was probably the purpose and intention of the legislature to give such jurisdiction, but it is equally obvious that they have not done so in terms, or by any necessary implication. It might be wrought out by construction, in the same mode that this court have often been compelled to piece up the shreds of implications in a statute to make out what was intended to be enacted, and was not fully

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expressed. This we have sometimes done in criminal cases, to save the entire failure of justice. But as here there is no necessity of doing that for this purpose, the county court clearly having jurisdiction to try the offence, we think it better to leave the matter there where many would consider it more appropriately belonged, and where all must admit it is safe to leave it, and where this statute and the general laws of the State upon the most obvious construction, do fix it. We, therefore, hold that a justice of the peace has no jurisdiction to try this offence.

II. But in regard to the effect of joining this count with the others, which the justice had jurisdiction to try, we are not able to perceive that any serious embarrassment should follow from the joinder of this count with the others.

It is not like a civil action, where the joinder of one count beyond the jurisdiction of a justice defeats the jurisdiction of the action.

Here the justice had jurisdiction of this count for the purpose of making inquiry and binding over the respondent for his final trial before the county court. The form of the complaint would be the same, whether the justice has jurisdiction to try the offence or only to bind over for trial, and we see no serious objection to joining them in one complaint. The justice might have bound over the respondent on this count and tried him upon the others, and no such embarrassment as was suggested would occur. The justice does not return his original papers, but sends up copies of the proceedings when offenders are recognized for trial in the county court. That might have been done here, and the respondent tried on the other counts. Or he might be discharged upon these counts and tried upon the others. It is much like joining a common assault and an assault with intent to murder in the same complaint before a justice. And even a common assault may exceed the jurisdiction of the justice to try. He must first inquire in regard to its enormity, and determine whether to try it or recognize the offender for trial in the county court. And we see no more inconvenience in holding a court of inquiry in regard to one of the counts, and a final trial upon the other. And if, being all of the same character, they are all heard together, there is no

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difficulty in the justice disposing of them according to his different powers in regard to them. And as he made no order upon this count, which is equivalent to a discharge, that was a final disposition of this count, and the appeal did not bring it before the county court and the demurrer must be overruled.

If the justice had convicted the respondent upon this count, as he no doubt supposed he might do if the proof were sufficient, we do not apprehend that would have produced any serious embarrassment when the case was brought into the county court by appeal. For each count in the complaint is several and stands altogether upon its own merits. It is competent for the county court, upon an appeal, to quash one of the counts in a complaint and try the respondent upon another. Nor is the respondent entitled to a discharge on the count where the justice had jurisdiction to try, because one of the counts is defective or exceeds the jurisdiction of the justice to try, if he had jurisdiction of the offence there charged for any purpose. Nor should the entire proceedings be quashed because the justice entered up a wrong judgment upon the count, where he had only jurisdiction to bind over for trial. But no such question arises here, as the judgment entered on these counts was correct. The only real ground of complaint here seems to be that the justice really might have supposed he had jurisdiction to try this count. But that has not injured the respondent. The trial, if by the court, would be the same in either case, and upon an acquittal there would also be the same judgment in either case, whether the respondent was on final trial or on inquiry merely.

Demurrer overruled and case remanded to the county court.

Briggs v. Estate of Thomas.

WILLIAM P. BRIGGS v. THE ESTATE OF HENRY THOMAS.

Statute of limitations. Settlement of estates.

If a debtor die before the statute of limitations has run upon his debt, his death will at most only suspend the operation of the statute until two years after the grant of letters testamentary or of administration upon his estate.

The plaintiff's claims against the intestate, being on note and book account, matured in 1843. The intestate died in 1847, and administration was immediately taken on his estate, and commissioners appointed who made their report in June 1848, the plaintiff having neglected to present his claims before them. The estate remaining unsettled, the plaintiff, in 1856, procured the probate court to open the commission for the receipt and examination of the plaintiff's claims: *Held*, that they were barred by the statute of limitations.

APPEAL from the decision of the commissioners on the estate of Henry Thomas, disallowing the plaintiff's claim.

It appeared that the plaintiff's claim, which consisted of notes and a book account, accrued and became due in 1843; that the intestate died on the 3d of July, 1847; that immediately thereafter administrators were appointed on his estate, and also commissioners to receive, examine and adjust all claims against him, and that the 11th of February, 1848, was fixed by the probate court as the limit of the time for the presentation of such claims; that the plaintiff's claim was not presented to the commissioners nor acted on by them previous to that time; that on the 23d of June, 1848, the commissioners returned their report to the probate court; that the same was accepted and allowed, and contained no mention of the plaintiff's claim; that on the 25th of November, 1856, the plaintiff applied to the probate court in writing to open the commission, and the estate not having then been settled, the probate court, after giving due notice of the application, opened the commission and gave the plaintiff five days to present his claims and procure a report on the same, during which time the claims in question were presented, and were disallowed, and so reported by the commissioners, from which disallowance the plaintiff appealed.

In the county court, the defendant having pleaded the statute of limitations, the court, at the September Term, 1858, in Chit-

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tenden county, — PIERPOINT, J., presiding, — decided that the plaintiff's claims were barred by the statute of limitations, and rendered judgment for the defendants, to which the plaintiff excepted.

The plaintiff, *pro se*, with whom was *J. A. Wing*.

Roberts & Chittenden and *Geo. F. Edmunds*, for the defendant.

POLAND, J. The general statute of limitations, applicable to the claim of the plaintiff, bars a recovery after six years.

The 15th section of our statute of limitations provides, that, when a debtor dies, the creditor shall have the further time of two years in which to procure his claim to be allowed by the commissioners, unless they shall make their final report in a shorter time.

The statute evidently proceeds upon the basis that from the death of the debtor until the final report of the commissioners, within the two years, all claims against the estate are to be considered as pending allowance and adjustment by the commissioners, and therefore during this period the statute shall not run upon the claim, on the same principle that the statute does not run upon a claim while an action is pending to enforce it.

This we think is the only effect of this 15th section: to suspend the operation of the statute for this period, but that in all other respects the statute is left to have its ordinary and general effect upon the debt.

It has been generally understood, and may now probably be regarded as settled, that from the death of the debtor until the appointment of an administrator, the statute would not run, and for the plain reason that during such period there is no mode in which the creditor can enforce his claim; *Hapgood v. Southgate*, 21 Vt. 584. But this case is not affected by such a principle. But the plaintiff claims that the effect of the act of 1845, Comp. Stat. 351, sec. 9, empowering the probate court in its discretion to open a commission for the allowance of claims after the expiration of the two years, at any time before the settlement of the estate is finally closed, is when acted upon, and a commission opened, to extend this suspension of the statute over the whole

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period of time from the death of the debtor until the last report of the commissioners is made, although it may be more than two years, or more than the whole time allowed by the general statute of limitations.

Section 15, Compiled Statutes 352, provides that all claims not presented to commissioners within the period allowed shall be forever barred, etc. And this applies to all claims, whether barred by the statute of limitations or not.

This is not properly a statute of limitations, but was made for the purpose of compelling all claims to be brought in before the commissioners, so that there may be a speedy settlement of the estate. It is a statute bar, or statute discharge of the claim, so that no recovery can be had upon it in any other form.

The act of 1845, when acted upon by the probate court, removes this statute bar, as to the particular claim for which the commission is open, but does not affect the operation of the statute of limitations. It gives the claimant an opportunity to present and litigate his claim, but leaves him to sustain it or not upon general principles of law, and subject to all legal defences which may have attached to it.

In the present case the plaintiff's claim had run some four years before the death of the intestate, and more than six years after the commissioners had made their original final report, before the plaintiff procured the probate court to open the commission to allow him to present his claim.

We all agree that the court below correctly held the plaintiff's claim barred by the statute of limitations. This construction gives effect to all the various statutes, and deprives no party of a fair opportunity to substantiate his claim if he have a just one, while the opposite one claimed by the plaintiff, would keep claims on foot as long as the final settlement of an estate might be delayed, however great, which is a result the legislature could never have intended.

Judgment affirmed.

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EDWIN F. HOADLEY v. THOMAS F. HOUSE.

Sale. Rescission of contract.

A contract of sale cannot be rescinded after delivery simply because the article delivered is not equal in quality to that contracted for. The difference must be one of *kind* or *class*.

In order to rescind a contract of sale on account of a difference in *kind* between the article contracted for and that delivered, notice must be given to the other party thereof as soon as the difference is discovered, and so far as possible, the party seeking to rescind must restore the other party to the condition he was in before the contract was made.

Therefore, where one had sold and disposed of a portion of certain goods, which another party had delivered him upon a contract of sale, before he discovered that the goods delivered were different in kind from those contracted for; and thereupon immediately notified the other party to take the remaining goods back for that reason, and said he would pay him for the portion he had sold; *Held*, that the rescission of the contract was not complete, because the vendee did not *tender* the vendor the value in money of the goods which he had sold.

BOOK ACCOUNT. The auditor reported the following facts:

On the 30th of September, 1857, the plaintiff contracted to sell the defendant a quantity of mess pork at twenty-three dollars per barrel, which the plaintiff was to prepare and deliver at the defendant's store in St. Albans. On the 2d of October, 1857, the plaintiff delivered six barrels and one-half barrel of pork, the barrels being headed up tight and the half barrel being open, and the defendant credited the plaintiff with the contract price of the pork on book account.

It appeared before the auditor that *mess* pork consists solely of the sides of the hogs between the hams and shoulders, with the bone in.

The plaintiff, in filling the barrels of pork which he delivered to the defendant, put in not only mess pork, but also the neck and shoulders and rump pieces of the hogs to the amount of about one-quarter of the whole; and the pork furnished by the plaintiff to the defendant was not worth so much as mess pork by two dollars per barrel.

The pork in the half barrel was all mess pork, and the plaintiff did not discover that the pork in the six barrels differed in any

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respect from mess pork until the 21st of October, 1857, when he first opened the barrels. Previous to this time he had sold the pork in the half barrel.

Immediately on making this discovery the defendant notified the plaintiff that the pork was subject to the latter's order because it was not mess pork, and that all the pork was in the defendant's cellar except the half barrel, which he said he had sold, and that he wished the plaintiff to take the six barrels away, and that he would pay ~~for~~ for the half barrel, but the plaintiff refused to take the pork away, and on the same day brought this suit against the defendant.

After the commencement of the suit and about one week before the term of court at which it was returnable, the defendant sent a messenger to the plaintiff, who made him a tender of fifteen dollars for the half barrel of pork which the defendant had used, but the plaintiff refused to receive it.

The fifteen dollars so tendered was sufficient to cover the value of the half barrel of pork and all the costs which had then accrued in the suit. The six barrels of pork remained in the cellar of the defendant until after the trial before the auditor, and were not used by the latter.

Upon this report the county court rendered judgment for the plaintiff for the value of the pork delivered, estimating each barrel to be worth two dollars less than the contract price for mess pork, to which judgment the defendant excepted.

H. R. Beardsley, for the defendant.

H. G. & L. H. Edson, and *W. W. White*, for the plaintiff.

ALDIS, J. Two questions arise upon the auditor's report: 1st, had the defendant a right to rescind the contract? 2d, if he had the right, did he so exercise it as to enable him to defend against this suit?

I. The report shows that the plaintiff was to deliver the defendant *mess* pork; that the pork he delivered was not mess pork, but was of a different *description* or *kind*, and not merely of a different or inferior *quality*; and that when delivered it was

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salted, packed and headed up in barrels, so that the defendant could not discover that it was of a description different from the kind he was to have; that in about two weeks he discovered that it was of a different description of pork from mess pork; that during the two weeks he had used and sold a half barrel which was mess pork, before he could discover the difference of the rest of it from the kind he was to have.

After thus receiving the property and crediting the plaintiff for it on book, and using a part, though but a small part of it, the defendant could not rescind the contract for a mere inferiority in the *quality* of the article. The difference must be one of kind or description. The article must turn out of a different description in kind or class from the article named in the contract.

It appears from the auditor's report that mess pork has a precise meaning in trade, and comprises only that pork that is taken from the sides of the hog between the shoulders and the hams, and no other part of the animal; and that the pork delivered contained neck, rump and shoulder pieces, in quantity about one-quarter of the whole. It would seem that this was a difference in kind, and not merely in quality, and that the defendant might well say this is not the article the plaintiff was to deliver.

Again, he could not rescind the contract if at the time of the delivery of the article he could have discovered, by the use of ordinary diligence, that it was not of the kind he bargained for. But it would seem that the pork was packed in barrels and the barrels headed up, and that without unpacking he could not discover the defect; and that in a short time he did discover the defect, and then immediately gave notice to rescind and return the property.

Nor could the defendant rescind the contract unless both parties could be put in the same situation in which they were when the contract was made. This seems to be a rule which has been adhered to with great strictness. Hence, when one of the parties has derived a benefit from the enjoyment of the contract, as in the leading case of *Hunt v. Silk*, 5 East 449; or may have been injured by the other party's use and possession of the property, though but for a short time, as in *Been v. Blandford*, 2 Y. & Jerv. 278, there the contract cannot be rescinded. Hence,

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in *Mayer v. Dwinell*, 29 Vt. 303, where the right to rescind was reserved in the contract, the use of the property to a greater extent than was necessary to test it, was held to bar the defendant from his right to rescind.

In *Muller v. Eno*, 3 Duer 421, it is held that an implication of warranty, attached to a purchase of goods, should last no longer than is reasonably necessary for the examination of the articles.

In *Lyon v. Bertram et al.*, 20 How. 150, the cases on this subject are reviewed by Judge CAMPBELL, and the doctrine sustained that if, upon a sale with warranty, the vendee receive a part of the goods sold, and sell them, and then discover the defect, he cannot then rescind the contract and refuse to receive the remainder. His remedy would be by showing his damages in a suit against him, or by commencing an action himself for the breach of contract. But in applying these general principles to the facts of this case, the court do not concur in opinion, and do not therefore pass upon this point, as there is another point in regard to the manner in which the right to rescind was exercised, (granting it to exist) that is decisive of the case in favor of the plaintiff.

If the defendant had the right to rescind, he was bound to exercise the right so as to restore the plaintiff to the condition in which he was when the contract was made. Even if it was the fault of the plaintiff that the pork was so packed as to conceal the defect and oblige the defendant to use some of it before he could discover the defect, and that it was thus owing to the plaintiff's wrongful act that the defendant could not upon rescinding return the whole of the property as he received it; still, it was his duty not only to rescind and to return the property on hand, but also to restore to the plaintiff the value in money of the part he had used. This, perhaps, was all he could do to restore the plaintiff to his former condition, but this much, at least, he was required to do. It was not enough to offer to pay for the half barrel he had sold; he should have tendered to the plaintiff the value of the property he had thus used. This he did not do. He said to the plaintiff that he would pay him for the pork he had used, but he did not tender or offer him any sum whatever by way of payment. The plaintiff was not bound to rely on the defendant's promise to pay him. He had a right to treat the

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contract as not rescinded until an actual tender of the money for the property which was not returned. This seems to be the necessary result, taking the most favorable view that we can take of the defendant's right to rescind.

Judgment affirmed.

HANNAH TOWNSEND v. THE ADMINISTRATOR OF THE ESTATE
OF JOHN DOWNER.

Tax sale. Adverse possession. Ejectment. Presumption of a deed. Married woman. Probate court. Wills. Jurisdiction.

The validity of a tax sale will not be presumed from the mere deed of the collector unaccompanied with extrinsic evidence that any of the prior proceedings, requisite in the case of a vendue sale, were taken, or if any were taken, that they were carried on in a legal manner in any particular.

Neither, in an action of ejectment, will any presumption be made in favor of the validity of such a deed, merely because the party claiming under it proves an adverse possession to the title of the other party, if such adverse possession be for a less period than that prescribed by the statute of limitations as a bar to the other party's claim.

The defendant in ejectment may, for the purpose of defeating the plaintiff's recovery show even by *presumptive* evidence an outstanding title in another, though the defendant be in no way connected with such title.

In such actions circumstances, though in themselves slight and trivial, yet if accompanied by long and peaceable possession, should be allowed to go to the jury as evidence for the defendant to prove the presumed existence and loss of deeds or other instruments.

The circumstances detailed, which in this case were held proper to go to the jury in connection with the fact of long and peaceable possession, as evidence tending to raise the presumption of a grant.

The presumption of a grant from such circumstances is one of fact and not of law.

In cases not within the statute of limitations grants are presumed, or proved by mere length of possession and without auxiliary circumstances.

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But in cases within the statute of limitations mere length of possession, however great, will not be sufficient to raise the presumption of a grant, unless the possession is for as long a period as that required by the statute to constitute a bar to a counter claim. But in such cases, where there has been a long and peaceable possession of land consistent with the grant to be presumed, and there are other circumstances which make it reasonable to believe that such grant was actually made, but through great lapse of time, or other causes, the proper evidence of such grant is probably lost or destroyed, then the length of possession and the auxiliary circumstances should be allowed to go to the jury, and they should pass upon the question whether a grant has probably been made.

If a deed conveying an entire tract, or several different parcels of land, is sought to be proved by presumptive evidence, possession by the grantee of a part of the tract, or of some of the parcels, claiming under the deed, is evidence to prove its existence in a suit, in which the title to a portion of the tract, or to a separate parcel, comes in question, although there has been no actual possession of the portion or separate parcel sued for.

Though the ancient record of a deed improperly acknowledged is not in itself evidence of the execution of the deed, yet such record, in connection with long and undisputed possession consistent with the deed, and other circumstances which tend, as matter of fact, to show the probable execution and loss of such a deed, is admissible as evidence to go to the jury upon the question whether they will presume the existence and loss of the deed.

The fact that infants and married women own proprietary rights in townships does not prevent their being bound by the acts of the proprietors in making divisions at legal meetings, or by subsequent acquiescence in such a division.

When a will executed in another jurisdiction has been there proved and allowed, and a probate court in this State has allowed a certified copy of such will, and the foreign probate thereof, to be allowed, filed and recorded here as an original will, it will be presumed that the probate court had jurisdiction of the will until the contrary appears.

All objections to the validity of the authentication of the foreign probate of the will must be taken in the probate court or they will be considered as waived.

EJECTMENT for lot No. fifty of the eighth division in that part of Burlington now annexed to Williston, containing twenty-three acres. Plea not guilty and trial by the court at the November Term, 1857, **BENNETT, J.**, presiding.

The plaintiff introduced in evidence a certified copy from the records of deeds, &c., in the town clerk's office in Williston, of a certified copy of the record of the proceedings of the probate court for the district of Chittenden on the 19th of September, 1849, allowing a copy of the will of Thomas Youngs to be filed and

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recorded in that court, and allowing and approving such will. The copy so presented was certified by William Cogswell, County Judge of Queen's county, New York, to be a true copy from the record of the probate of the will of Thomas Youngs in the surrogate's court of that county. In the body of the certificate the attesting officer was described as "county Judge of said county, performing the duties of surrogate and acting as clerk of the surrogate court." From this certified copy it appeared that this will was executed in the State of New York September 10, 1792, was duly proved in the surrogate's court for Queen's county on the 5th of September, 1797, and that it was executed by the testator in the presence of three subscribing witnesses. In it the testator devised to the plaintiff "a certain right of land which I (the testator) purchased lying on the main supposed to be in the State of Vermont."*

The plaintiff also introduced in evidence the record of the original charter of Burlington dated June 7th, 1763, in which the name of Thomas Youngs appears as one of the grantees, also the proprietors' records of Burlington showing a draft of the lot in question to the original right of Thomas Youngs in the eighth division of lands among the proprietors made February 19th 1801, together with a record of the survey of said lot, and no question was made by the defendant but that this lot with others was set off by an act of the legislature from Burlington to Williston in 1797. From the proprietors' records it appeared that the first seven divisions of lots were all made in June, 1798, and that in such divisions no lots were drawn to the right of Thomas Youngs or of twenty-eight others of said proprietors, but that lots were drawn in said division to the rights of all the remaining proprietors.

The plaintiff also introduced certain testimony tending to show that the testator, Thomas Youngs, died in Queen's county, New York, on Long Island, in 1797, that he was the same Thomas Youngs described as one of the proprietors of Burlington in the charter of that town; that the land devised by him to the plaintiff as above mentioned was his right as one of the proprietors of

* This devise is not void for uncertainty. *Townsend v. Downer*, 23 Vt. 225. **REPORTER.**

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the town of Burlington ; that from the death of the testator until August, 1843, the plaintiff was a married woman ; that the land owners in Burlington had always uniformly acquiesced in the correctness of the eighth division of lots in that town, (and the defendant, by cross examination of the same witness, showed a similar acquiescence in the correctness of the seven prior divisions ;) and that the defendant was in possession of the premises in dispute in 1849, at the time of the commencement of this suit.

The defendant introduced in evidence the following extratt from the proprietors' records of Burlington :

"On the 16th of June, 1798, at a meeting of the proprietors of the township of Burlington in the county of Chittenden and State of Vermont, the following proceedings were had.

Whereas, it appears that Ira Allen of Colchester, in the county aforesaid, has been a considerable land owner in said township of Burlington, and hath pitched a considerable part of the lands in said Burlington, and by himself and others holding under him hath taken possession thereof, and as the said Ira Allen hath generally avoided mentioning the name of the original grantee in his deeds of conveyance much difficulty would arise in dividing the lands so pitched and taken possession of by the said Ira Allen, and others holding under him, to any particular rights. Therefore, *voted*, that William Coit, Stephen Pearl, and Zaccheus Peaslee be a committee to ascertain the number of rights of land that the said Ira Allen hath owned in said Burlington, and also ascertain the quantity of lands that hath been pitched by the said Ira Allen in said Burlington, and report the same to the proprietors as soon as may be.

At an adjourned meeting of the proprietors aforesaid held on the 18th of June, 1798, the following was done :

Messrs. William Coit, Stephen Pearl and Zaccheus Peaslee, being a committee elected for that purpose, reported to the proprietors that by the records of said Burlington in the town clerk's office of said town and other documents, it appears that the original rights of the following proprietors of said township of Burlington have been deeded to the said Ira Allen, viz : " (naming twenty-nine of the proprietors and among them Thomas Youngs.) " And that it also appears that the said Ira Allen hath pitched,

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and by himself and others hath taken possession of the full complement and proportion of lands belonging to said rights, which said lands so pitched and taken possession of by said Ira Allen and others holding under him include the following lots, to wit :” (naming and specifying two hundred and ninety lots, that being the exact number of lots to which the said twenty-nine proprietors would be entitled in the first seven divisions of lots, containing in the whole nine thousand two hundred and eighty-three and one-half acres of land,) “and to prevent injuries that may arise to the settlers under the said Ira Allen, by voting the lots they live on or improve to any particular proprietor’s rights, and it being the sincere wish of the proprietors not to interrupt the settlers under the said Ira Allen, therefore the proprietors present do unanimously vote that all the lots above mentioned be set off, assigned and considered as laid to the aforesaid original rights.”

The defendant also introduced in evidence a certified copy of the record in the town clerk’s office in Burlington of a deed from Thomas Youngs, Thomas Alsop, John Wright, Edmund Weeks, and John Wright, Jr. to Heman Allen, dated April 10, 1773, conveying all their rights, titles or shares of land as original proprietors of the township of Burlington. From this copy of the record it appeared that to this deed the names of Job Wheelsted, Obadiah Wright and John Wright were signed as attesting witnesses, and the only certificate of the acknowledgement or proof of this deed was in these words :

“Memorand. that fourteenth day of April, 1773, personally appeared before me, Henry Cruger, one of his majesty’s counsel, for the province of New York, John Wright, and did acknowledge that he signed, sealed and delivered this as his own free will, and did also, upon his solemn affirmation, declare that he saw all the persons whose names are subscribed, sign, seal and deliver this as their free and voluntary act and deed, and also see the subscribing witnesses sign as witnesses. HEN. CRUGER.”*

This deed appeared to have been recorded in the town clerk’s office of Burlington, February 20, 1795.

The defendant also introduced Charles Adams as a witness,

* In *Townsend v. Downer*, 27 Vt. 119, this acknowledgement was held to be insufficient to authorize the record of the deed in this State; and therefore that the record did not prove the existence of the deed.—REPORTER.

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who testified that he had been in the practice of the law for forty years in Burlington, and had been employed in a large number of land trials in that town, and that the assignment of the twenty-nine rights above mentioned to Ira Allen on the proprietors' records had always been acquiesced in, and that he had not known any of these twenty-nine proprietors to claim any of those rights; but on cross examination he testified that in none of the suits in which he had been engaged was the title claimed to be derived from any one of these twenty-nine proprietors. It also appeared that the town records of Burlington commenced in 1778, so far as any records could be found in the town clerk's office, and that the volume so commencing was numbered volume two, and that a first volume of said records could not be found, but no evidence was introduced that such a volume ever existed except the fact that the earliest volume which could be found was numbered volume two.

The defendant also offered in evidence a copy of the record of a collector's vendue deed from George Cleveland to Thaddeus Tuttle, dated April 4th, 1818, of the lot in question, and sundry mesne conveyances of the same from said Tuttle down to one Moses Marshall, and an original deed of the same from said Marshall to the defendant, dated December 13, 1847, all which were duly acknowledged and recorded. The defendant also introduced evidence tending to prove that said Tuttle and his successors in the chain of title had possessed the said premises as their own under said deeds down to the present time, and had improved the same claiming to own them, and it was admitted in the case that the defendant and his grantors had been in adverse possession of the premises since 1820, when the lot was conveyed by Tuttle to one Lincoln, who was in the chain of the defendants' title, until the commencement of this suit.

The defendant claimed that from the evidence in the case, the court ought to presume a conveyance from Thomas Youngs, or the plaintiff to Heman Allen, or some of his successors in title, or to the defendant or some one of his predecessors in the chain of title, or an abandonment or extinguishment of the claim or title of the plaintiff in some way.

The defendant also claimed that the record of the probate of

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the will of Thomas Youngs in the county of Queens was not legally certified so as to be admissible in evidence, and that the record of the probate court for the district of Chittenden did not show such facts as were necessary to give said probate court jurisdiction to admit said will to probate. These objections were both overruled by the court.

From all the testimony in the case the court found that the plaintiff was the devisee of the lot of land in question under the will of Thomas Youngs, that he was the same Thomas Youngs named as one of the original proprietors in the charter of the town of Burlington, and that the legal paper title to the land in question was in the plaintiff, and that the defendant and his grantors had been in adverse possession of the land in question from 1820 until the commencement of this suit.

The court also held that from the fact that the plaintiff was a married woman from 1797 until 1843, her claim to the land was not barred by this adverse possession; that no deed should be presumed from her to quiet the defendant's possession; that the record of the deed from Thomas Youngs and others to Heman Allen, dated the 10th day of April, 1773, was, under the decision of the supreme court in this case, reported in the 27 Vt. 119, inoperative to convey from Thomas Youngs an outstanding title; that, as the defendant's possession did not commence till 1820, and was not under any claim of title as derived from Heman Allen, but adverse to it, there was no ground for presuming a conveyance of this lot from Thomas Youngs through Heman Allen down to the defendant, especially as Thomas Youngs died in 1797; that the case did not show an adverse possession in any one till 1820; that no presumption should be set up against the plaintiff, while a *feme covert* in favor of an outstanding title to defeat her right, and that there was no ground to presume a grant from Thomas Youngs, or an abandonment of his title in favor of the defendant, or any of his grantors, and therefore judgment was rendered for the plaintiff, to all which decisions the defendant excepted.

Roberts & Chittenden, for the defendant.

Geo. F. Edmunds, Asahel Peck and J. J. Townsend, for the plaintiff.

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ALDIS, J. This is an action of ejectment to recover lot No. 50 in the eighth division in Burlington, containing twenty-three acres.

The plaintiff, to recover, shows that Thomas Youngs was one of the original proprietors of the town of Burlington; that in the division of the town the land in question was set to his right, and that he by his will devised that right of land to the plaintiff.

It is admitted in the case, or found by the court, that Thomas Youngs died in September, 1797; that at the time of his death the plaintiff was a *feme covert*, and so continued to August, 1843, when her husband died, and that this suit was begun in 1849.

The defendant's possession of this lot began in 1820, under a deed from George Cleveland, a collector of a land tax, and from that time to the commencement of this suit, the defendant or his grantors have held adverse possession of the lot.

As the plaintiff was a married woman from 1797 to 1843, it is not claimed by the defendant that she is barred of her right by the adverse possession under the statute of limitations.

But the defendant claims,

I. That from the possession of the defendant for twenty-nine years, from 1820 to 1849, under the collector's deed, the court should presume that the proceedings anterior to the collector's deed were legal and valid, so that a perfect title passed by such deed to Tuttle, under whom the defendant claims.

The defendant has not shown any of these proceedings. Upon this branch of the case his title rests solely upon his deed and possession of twenty-nine years.

The law has been long settled, that to make a good title under a vendue, the statute requisitions must be proved to have been strictly complied with, and that the general recitals by the collector that he has in all things complied with the statute are not sufficient. We are not aware of any case in this State where the doctrine of presumption has been applied to cure defects in such titles. In a case where the collector's deed was fifty-four years old, and the grantee had paid the taxes, the court refused to remedy defects in the title by presumption. But there had never been any possession under the deed, and it does not appear what the defects sought to be remedied were; *Reed v. Field & Briggs*, 15 Vt. 672.

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In Mass., *Coleman v. Anderson*, 10 Mass. 105, and 14 Mass. 145, sales by collectors have been put on the same ground as sales by administrators, and it has been held that tax bills, valuations and warrants, when not found, might be presumed to have existed, if the jury, from the other facts and proceedings shown, and from the lapse of time, could fairly and rationally so conclude.

Here the entire proceedings necessary to make a legal title by vendue sale will have to be presumed to be correct. Nothing whatever is shown in regard to them. If the previous proceedings had been shown, and had appeared to be correct and legal, except in some formal matter or preliminary requisite, of which the evidence would be like to perish with the lapse of time, then the long possession of the defendant, under a title thus substantially correct and legal, might perhaps have justified the court in dispensing with the customary strictness of proof in the defective points, and in submitting it to the jury to decide, whether compliance in that particular with the statute might not be presumed from the correctness of all the other proceedings, and the long possession and claim under the title. But nothing is shown here but the deed and the mere possession of twenty-nine years; there are no accompanying circumstances to show there was any tax sale, or if any, that it was legal in any particular.

Adverse possession for any period less than the time required by the statute to bar the plaintiff's right, *when standing alone and unaccompanied by other circumstances*, is no ground for presuming a grant, or for supplying by presumption a deficiency in a title. Where mere adverse possession is to pass the title and bar a recovery, the statute of limitations has by express provision specified the length of time for which such possession must continue, and if courts were to presume a grant solely upon the ground of adverse possession for a period less than the statute provides, and so bar a recovery by the true owner, the statute would be defeated. This doctrine was set forth by Lord MANSFIELD in *Eldridge v. Knott*, Cowp. 214, and is now universally recognized; 2 Phil. Ev., Cowan & Hill's Notes p. 356; 1 Greenleaf on Ev. sec. 17; *Wells & wife v. Morse*, 11 Vt. 9; *Sumner v. Childs*, 2 Conn. 607.

Upon this branch of title the defendant shows nothing but pos-

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session to sustain the presumption asked for, and this alone is insufficient.

The defendant relies upon the various facts proved in connection with Ira Allen's title, to support the presumption on this point. But as the title under the collector is in no way connected with the Allen title, but is in fact adverse to it, we do not think that those circumstances tend in any way to aid the presumption that the tax title proceedings were legal and regular.

II. Failing to stand upon the title under the collector's deed, the defendant next claims that the court should have presumed a conveyance from the plaintiff or from Youngs to the defendant.

1. The possession of the defendant under the tax title is clearly not sufficient to warrant any such presumption, as we have already shown.

2. The possession by Allen and others under him, of the first seven division lots from 1798, the deed from Youngs to Heman Allen of 1773, and the claim and possession of Ira Allen under it, and the division among the proprietors founded upon the assumed existence of such a deed, and the subsequent acquiescence of all the proprietors in such division; these are all acts and proceedings in no way connected with the defendant or his possession. The defendant derives no title from Allen. His possession is as well adverse to Allen as to the plaintiff.

The fact which he asks the court to presume is a grant from Youngs or from the plaintiff to *himself*. He does not claim that the length of *his* possession alone, or even the length of his and Allen's possession (extending from 1798 to 1849, and equal to fifty-one years) alone would be sufficient to raise such a presumption, for the plaintiff, from the decease of Youngs in 1797 to 1843, was a *feme covert* and within the exception of the statute of limitations, and hence, as to her, the lapse of time and length of possession standing alone would not create a bar. But the defendant says, these accompanying circumstances relating to Allen's possession and title, come in aid of the lapse of time and long possession, and all these united justify the court in making the legal presumption of the grant to the defendant. The difficulty with this view of the case is, that the accompanying circumstances have no legitimate tendency to prove the fact to be

presumed. So far from tending to show a grant to the defendant, they point in another direction, viz: to a grant to Allen, with whom the defendant is in no wise connected by possession or title.

That the accompanying circumstances which are relied upon in aid of the long possession, must be *consistent with such possession and with the fact to be presumed*, is abundantly settled by all the authorities; *Wells & wife v. Morse et al.*, 11 Vt. 10; *Doe v. Cooke*, 6 Bingh. 174; *Sellich v. Starr*, 5 Vt. 255; *Ricard v. Williams*, 7 Wheat. 109.

If the defendant relies upon his own possession, there are no accompanying circumstances to aid the possession, and mere possession is not sufficient.

If he relies on Allen's possession and the other circumstances in aid of Allen's title and possession, they are consistent with a grant to Allen, but are inconsistent with a grant to the defendant.

Hence, there was no sufficient evidence from which a grant to the defendant could be presumed.

III. The defendant claims that the undisputed possession by Allen and those under him, of the first seven divisions of this right since 1798, the lapse of time and other circumstances shown in aid of such possession, warranted the court in presuming a conveyance from Thomas Youngs to Heman Allen. Upon the trial in the county court the defendant did so insist.

To understand the proper application of the law to this case, it becomes necessary to note the facts which the defendant claims to have proved, and from which he claims to presume a grant to Allen. These are; 1st, an entry on the land records in Burlington, purporting to be a record of a deed from Thomas Youngs to Heman Allen, dated April 10th, 1773, duly signed, sealed and witnessed by two witnesses, proved according to the laws of New York, where it was executed, recorded in the town records in Burlington on February 20th, 1795, and conveying his proprietary right in Burlington. It has been decided by this court, 27 Vt. 119, that this deed as recorded is imperfect in this: 1st, that the acknowledgment is not according to the laws of New Hampshire, which then were the laws *de facto* of this State, and so was not entitled to registration; and, 2d, that at the time it was recorded the proprietor's clerk had no authority to record it, his

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authority to record being granted by the act of 1797, and therefore a certified copy of the record did not prove the existence of the deed.

2. The defendant shows the proceedings of the original proprietors of Burlington at meetings duly called, as appearing in the proprietors' records, in which in June, 1798, they in their votes state, that Ira Allen has been a considerable land owner in Burlington, and has pitched a considerable part of the lands in Burlington, and by himself and others holding under him, hath taken possession thereof; that he has generally avoided mentioning the name of the original proprietor in his deeds to settlers, and hence much difficulty would arise in dividing to any particular right the lands so pitched and possessed by Allen and settlers under him, and therefore the proprietors voted to appoint a committee, of whom Peaslee who had recorded the deed of Youngs to Allen was one, to ascertain the number of rights Allen had owned, and the quantity of lands pitched by him, and report to the proprietors. That on the 11th of June, 1798, the commissioners reported to the proprietors at a regular meeting, that by the records of Burlington in the town clerk's office, and other documents, it appeared that the original rights of twenty-nine proprietors, including this of Thomas Youngs, had been deeded to Ira Allen, and that Allen and those under him had pitched and taken possession of the full complement and proportion of lands belonging to said rights, and then specified the lots in the first seven divisions so pitched and possessed by Allen, making about three hundred and twenty acres to each right. And in order to prevent injuries to settlers under Allen by voting the lots they live on to any particular right, the proprietors present voted unanimously that all the lots above mentioned be set off, assigned and considered as laid to the aforesaid original rights.

3. A deed from Heman to Ira Allen of all his rights in Burlington, dated November 12th, 1777, and recorded February 20th, 1795, the same day on which the deed from Youngs to Heman Allen is recorded.

4. Parol evidence to show that the division by the proprietors had always been acquiesced in, and that the twenty-nine rights set to Ira Allen on the proprietors' books had always been acqui-

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esced in, and that none of the twenty-nine proprietors had ever claimed any of their rights.

5. That in the division among the proprietors on the records, no lots were set to these twenty-nine rights claimed by Allen in the first seven divisions, but that in the eighth division of twenty-three acres to a lot, one lot was set against the name of each proprietor.

6. It does not appear that Allen took possession of the lots set to the twenty-nine rights in common, prior to Thomas Youngs' decease, but from June, 1798, to the commencement of this suit, a period of fifty one-years, it appears that he, or others under him, had been in quiet possession of the lots set in the first seven divisions to these twenty-nine rights. Indeed, the first seven divisions could not legally have been set to him, or to settlers under him, in lieu of their drafts, if they had not been in possession of the lots, that privilege being granted only to settlers who "lived on or improved their lots," and being intended to encourage settlement; Acts of 1787 and 1794.

The defendant claimed that this long and peaceable possession by Allen of the lots set to these twenty-nine rights, and all these auxiliary circumstances, would authorize the court to presume that Youngs had deeded his right to Heman Allen, and if so, then Youngs did not own the right at his decease, and so it would not pass by the will to the plaintiff, but would be outstanding in Ira Allen, or his heirs.

The county court do not seem to have passed directly upon the question thus presented by the defendant, whether Allen's possession and the papers and evidence in the case tended to prove, and were sufficient as presumptive evidence to satisfy the court, that Youngs did execute to Heman Allen the deed on record. The bill of exceptions says: "the court decided there was no ground for presuming a conveyance of this lot from Thomas Youngs through Heman Allen *down to the defendant*, as the defendant's possession did not commence till 1820, and was not under any claim of title as derived from Heman Allen, but adverse to it;" again, "there was no ground to presume a grant from Thomas Youngs, or an abandonment of his title *in favor of the defendant*."

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It further says "that the deed from Youngs to Allen of April 10th 1773, was, under the decision of the supreme court, inoperative to convey from Thomas Youngs an outstanding title;" also, "that no presumption should be set up against the plaintiff while a *feme covert*, in favor of an outstanding title to defeat her right."

But the decision in the 27th Vt. does not go to the length of saying that that deed, if proved to exist, would be "inoperative to convey from Thomas Youngs his title to Heman Allen;" but only that, the deed not being entitled to registry, a certified copy of record does not prove its existence. And although the language of the bill of exceptions is, that the county court held that by that decision the deed was "inoperative to convey from Thomas Youngs an outstanding title," we think it fair, and the only proper construction of that decision, to construe it as meaning the deed *as proved by the record alone*, and not the deed if proved sufficiently by other evidence. As between Youngs and Allen, the deed signed, sealed, witnessed by two witnesses and delivered, was valid and sufficient to pass the title to Allen, though never acknowledged or recorded; 6 Vt. 532. And it must have the same effect as against the plaintiff, who is a mere devisee of Youngs, and having no higher right than he or his heirs. As between Allen and subsequent purchasers and attaching creditors, the deed, *accompanied by possession* by Allen, was sufficient, for the possession by Allen would be equivalent to notice; *Griswold v. Smith*, 10 Vt. 452; *Rublee v. Mead*, 2 Vt. 544.

Indeed, the court in the 27th Vt. say, "the question of presumption, from lapse of time and attending circumstances, is one of fact, to be submitted to the jury, under proper instructions, which was not attempted. We have no occasion to speak of it farther." This expressly leaves the case open for the introduction of presumptive evidence to establish a deed or grant from Youngs to Allen. And the defendant offered the record of the deed made in 1795, in connection with lapse of time and other attending circumstances, as presumptive proof of such a grant.

If the court had directly found the facts that the presumptive evidence was not sufficient to prove that Youngs did convey his right to Heman Allen, as by the deed on record, that would have

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been explicit and a direct reply to the defendant's request on trial. But they seem to have taken another view and to have rested the case wholly on the ground that, as the defendant did not connect himself with or claim under that title, 1st, he could not set it up as an outstanding title, and, 2d, could not establish its existence, as an outstanding title, by presumptive proof.

The defendant's claim that a grant should be presumed from Youngs to Allen may be regarded and has been presented in the argument in two aspects.

1st. That the grant should be presumed as *matter of law*; that these circumstances raise a *conclusive* presumption not to be rebutted. This is the view which has been chiefly urged upon us in the argument.

2d. That the evidence *tended* to prove a grant *in fact*, and therefore the court should have directly passed upon the question and decided whether there was or was not such a deed from Youngs to Allen, and that the court's omission to pass upon this question, upon the ground that an outstanding title could not be proved by presumptive evidence against the plaintiff while a *feme covert*, was error. This second ground of error, as alleged by the defendant, we will first consider. It resolves itself into two questions.

1st. Can the defendant show an outstanding title in Allen by presumption? and, 2d, if he can, did the evidence offered tend to prove the fact to be presumed?

1st. The plaintiff in ejectment must recover upon the strength of his own title, not upon the weakness of his antagonist's. He must prove under the general issue that his own title is a good one, and entitles him to the possession of the premises.

The defendant under the general issue may disprove every fact which it is necessary for the plaintiff to establish. Hence, he may show an outstanding title in a stranger, for this disproves the fact of an existing title in the plaintiff. This rule is founded in a wise policy which discourages litigation as to land titles against the possessor, except where it is carried on by the true owner. It favors quiet and peaceable possession; it says, if the true owner will not disturb the one in possession, no other shall. In all cases where the defendant shows title in another, in order

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to defeat the plaintiff, he does not trace the title to himself. If he did, it would be title in himself, not in another.

The very fact that the title is called *outstanding* shows that the defendant does not connect himself with it, and hence the doctrine of the county court must rest wholly on the ground that a defendant in ejectment cannot show an outstanding title *by presumptive proof*.

In this case the plaintiff shows Thomas Youngs a proprietor in Burlington, that this lot was set to his right, and that upon his death in 1797, he devised it to the plaintiff. This is her legal claim of title. If Thomas Youngs in his lifetime deeded away the right to Heman Allen, it is obvious that a link in the chain is out, for then he did not own the right when he died, and there was nothing which could pass by the devisee to the plaintiff. Then at Youngs' death the title to this land was outstanding in Heman, or, rather, in Ira Allen, (for Heman deeded all his lands in Burlington to Ira Allen in 1777.)

Now this is the fact the defendant seeks to establish; and clearly, it is the disproving of a fact material and indispensable to the support of the plaintiff's title.

We think that such a defence, by one who has had peaceable possession under a claim of title for twenty-nine years, ought to be allowed, for if proved, it strips the plaintiff's title bare of all merit and equity; it deprives her of all claim to test the lawfulness of the defendant's possession.

Nor is this all;—the defendant shows by this proof that the plaintiff is not, and that Allen is the true owner; and he may further prove that as between himself and the true owner, (Allen or his heirs) he has acquired the title by adverse possession. It results then in this, either the defendants, by adverse possession, or Allen, by deed from Youngs, is the true owner; the plaintiff has no legal title to the lot. Now may the defendant prove this by presumptive evidence? If not, the plaintiff, who has no title whatever, may get title by recovery *against the defendant*, on the ground that the defendant cannot, as against her, plead the statute of limitations, nor show the true title to be outstanding in Allen, or to be in himself by adverse possession against the true owner of record, Allen; and having thus recovered against the defend-

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ant, he may then hold, *as against Allen*, by setting up this adverse possession of the defendant and recovery against him. So strange and inequitable a result would show the reasonableness of the rule that a defendant may show the title outstanding in a stranger, for that brings the controversy on to the right footing, viz: between the one in possession and the true owner.

If the deed of 1773, now on record, had been acknowledged, so that a certified copy of it would have proved its existence and execution, there can be no doubt but that the defendant might have shown it, and thus have set up an outstanding title in Allen. This is recognized in the decision in this case in the 27th Vt. 120, for the decision of the county court in directing a verdict, could stand only on the ground that the defendant showed an outstanding title, and that judgment was reversed, not because the deed if proved could not avail the defendant, by showing an outstanding title, but because on account of its defective acknowledgement it could not be proved merely by a copy from the record.

But a deed may be proved in various ways; by the production and proof of execution of the original, by mere production from its proper custody of the original after thirty years from its date, by proof of the loss of the original and of its existence and contents by secondary evidence, and lastly, by presumptive evidence, where there has been a long and undisputed possession according to the deed and from the great lapse of time and from other auxiliary circumstances, the existence and loss of the instrument may fairly and rationally be presumed and actually believed. Now all these different modes of proof tend to one common result, and are only different ways of reaching the same end, viz: *the actual belief in the existence of the deed*. If the mind is really convinced of that fact as a fact, not assuming it to exist as matter of law and upon the principle that it is no matter whether it ever did exist or not, but believing that in truth the deed was really executed by Youngs to Heman Allen in 1773, it would seem as if the *result* was the important thing to be considered in deciding upon the rights of the parties, and that the particular mode of proof by which the mind is led to the result, was of no consequence. We see no reason why a defendant in ejectment should be confined to any particular kind of legal evidence in establish-

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ing his defence. If the defence is a good one, and the evidence legally tends to prove the defence and satisfies the minds of the triers that it is true, that is enough.

Shall we say, an outstanding title in Allen proved by positive evidence is a good defence; proved by presumptive evidence it is not? If so, the defence would be good or bad, not upon its own merits as an answer to or denial of the plaintiff's claim, but upon the kind of evidence by which it should be proved. Presumptive evidence is often as satisfactory to the mind as any other. It is resorted to, because from the great lapse of time and the negligence with which papers affecting the titles to lands are often kept, losses of the proper muniments of title may be presumed; and thus where a long possession corresponding with the grant to be presumed exists, that, with auxiliary circumstances, is admitted as evidence to supply the defects in the title. Its force as proof depends upon the character of the circumstances. Like all other evidence it may be very strong or it may be very weak. We see no reason why it may not as properly be used to prove an outstanding title, as to prove a title in the defendant. Suppose Allen had been the defendant here. He would have proved the identical facts shown by the defendant, and no others. It is admitted that he, proving, not an outstanding title, but one in himself, might rely on these facts.

Now the evidence is precisely the same, its power of producing belief on the mind the same; it does produce the same belief. Shall we say, the belief in one instance is good defence, in the other it is not? The plaintiff's title is the same in each. She has the same means of proving her title good, and of disproving the defence, in one case as in the other.

It is not a case where she is concluded by the presumption as matter of law, but she is at liberty to show any facts to rebut or contradict the presumptions contended for by the defendant.

The cases cited by the plaintiff to show that the defendant cannot set up an outstanding title, do not apply to this case.

In the execution of trusts, grants, deeds and surrenders of terms are presumed, and where the *cestui que trust* is entitled to the beneficial use and possession of the property, a defendant in possession is not permitted to set up a nominal title outstanding

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in the trustee, to defeat the right of the *cestuis que trust*, for that would be to defeat the owner's real and beneficial title by setting up his own nominal and outstanding title. To prevent this mischief the law will presume a deed from the nominal to the real owner; *England v. Slade*, 4 T. R. 682; 7 T. R. 2; Bull. N. P. 110; *Doe v. Cooke*, 6 Bing. 174; 12 Ves. 251.

But such cases have no analogy to the one at bar. Even in such the defendant might set up a real outstanding title, adverse and paramount to the title of the *cestuis que trust*. To make such cases apply here, we must suppose Allen to hold the title for the use of the plaintiff, which is directly contradictory to all the evidence.

In all the cases of that class, it will always be found that the outstanding title or term is merely nominal, and that the term has been satisfied, and the real owner entitled to a conveyance.

Nor is this a case where the defendant, having entered under the title or by license of the plaintiff, is estopped thereby from setting up an outstanding title. Such decisions rest on very different grounds.

Nor is the defendant a mere intruder. He holds by claim and color of title as well as possession, nor does it appear that there was ever any possession of this lot prior to his own. As against all the world but the plaintiff he has good title by possession. As against her he has good title by virtue of Youngs' deed to Allen, and adverse possession as against Allen. Or else it is a good subsisting title outstanding in Allen.

The case of *Doe v. Cooke*, 6 Bing. 174, has been cited to show that a defendant in ejectment cannot set up an outstanding title by presumption to defeat the plaintiff's apparent paper title. Neither the case itself, nor any of the cases cited in it, establish such a doctrine. In that case, the defendant's possession was not consistent with the fact to be presumed; no possession by those in whose favor the legal estate was held. Mr. Middleditch was the owner, originally, of the premises. He first mortgaged to one of the plaintiffs, then devised his estate to Mangles & Taddy, in trust to sell and pay mortgages, and hold the residue for his wife. His wife died and devised the estate to the other plaintiffs, as trustees. Thus the suit was brought by one of the

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plaintiffs and by the trustees of the wife. If the mortgage was paid, then the legal title would be in Mangles & Taddy for the use of the wife, etc.

The defendant in possession without right offered to show that the mortgage was paid, and so the suit should have been brought by Mangles & Taddy instead of the plaintiffs. To show this his own possession was not presumptive proof, for it was not under any title derived from Middleditch. He showed the commencement of proceedings in chancery, and a decretal order to sell the estate and pay off the mortgages, but showed nothing further, and the court in conclusion seem to rest their decision on this point, that he showed only a partial statement of the ground of presumption. It would seem from the case that the outstanding title he tried to set up, was in substance the plaintiff's title, though nominally in other trustees, and hence the court might well say, "that the presumption asked for would rather tend to defeat than to promote the ends of justice."

But if the defendant had set up a title outstanding in persons not claiming under or for Mr. Middleditch or his wife or her heirs, a title adverse and paramount to the plaintiff's in that case, there can be no doubt but that the defendant would have been entitled to have shown it by presumptive evidence.

The case of *Appleton v. Holton*, 8 Vt. 241, is cited as being adverse to the views here suggested. But there the defendant attempted to set up mere lapse of time as a bar to the mortgage debt and to the suit brought by the mortgagee. He showed no possession nor any other circumstances tending to prove the debt paid in fact; nor was he in any way connected with the mortgage debt; no possession of the premises by the mortgagor, but on the contrary the possession vacant. Between presumption of payment of the debt in fact, and a presumptive bar by lapse of time to recover on the bond, there is a wide difference. The difference is referred to by the court and makes that decision wholly inapplicable here.

The case of *Schauber v. Jackson*, 2 Wend. 14, in the court of errors in New York, is directly in point to show that an outstanding title may be shown by presumptive evidence by one in possession, who is not in any way connected with such title.

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The defendant's father went into possession about fifty years before suit brought declaring that he did not know who the owner was, but wished to pay if he could be ascertained, and he and the defendant, his son, had always held by bare possession without color of title.

The plaintiffs claimed title as heirs of Wm Appel, the original patentee. To raise the presumption that Wm Appel had in his lifetime conveyed away the land, or that his executors had done so after his decease, the plaintiff showed that the land in question was reputed to belong to DeLancy and Dubois, and was generally so spoken of, that in deeds of adjacent lands they had been described as bounding on this as Dubois and DeLancy's land, that in a deed of land in the east half of this tract, the west half was designated as Dubois and DeLancy's land, that Mrs Pelte, one of the heirs of Wm Appel, said when speaking of her property that all she had was two houses in New York, that the executors of Wm Appel were directed by his will to sell all his real estate, that Mrs Pelte, in an arbitration bond with one Killam, as to the title of a house in New York, claimed that John Appel, the executor of Wm Appel, had bought it with money belonging to the heirs under the will, that for ninety years prior to suit brought, neither Wm Appel nor his heirs had made any claim or exercised any act of ownership, that the husband of Mrs Bogert, who inherited from Mrs Pelte, was a lawyer in Albany, residing within twenty miles of the land in dispute. No deed or draft or copy of a deed or writing of any kind referring to any deed from Appel or his executors to any person was shown, no such deed had been heard of, no possession by Dubois and DeLancy, or any one under them, no possession by any one claiming under a grant from Appel in any way.

The court held that the evidence above detailed should have been submitted to the jury as presumptive evidence, that Appel or his executors had conveyed away his title, and that the defendant was not precluded from showing that the title was out of the plaintiff, though he was unable to trace it to himself. This case is therefore an authority upon this point, and it forcibly illustrates how, after great lapse of time, and a long and peaceable possession, courts will allow circumstances, in themselves very slight

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and trivial, as evidence, to go to the jury in connection with possession and lapse of time, to prove the presumed existence and loss of deeds or other instruments. See also *Jackson ex dem. Seylee v. Morse*, 16 Johns. 197.

2. Did the evidence offered by the defendant tend to prove by presumption a conveyance from Youngs to Allen? It may serve to elucidate this point to consider in what cases the law allows grants to be presumed, and for what reason resort is had to presumptive evidence. Some obscurity exists both in the decided cases and in the elementary treatises on this subject from the indefinite use of the phrases, "the law will presume a grant," "grants are presumed," etc. There is this obvious distinction in cases.

Where from long possession with or without auxiliary circumstances a grant is presumed *as matter of law*, and without regard to the fact whether such a grant was really made or not, there it may, with the strictest propriety be said that the law presumes a grant. In such a case, under the practice in this State, it would be the duty of the court to direct a verdict.

But where long possession and other attending circumstances are admitted as evidence tending to show that a grant was *in fact* made, that it is probable and not unreasonable to believe it to have been made, there it cannot strictly be said that a grant is presumed, that the law in such case presumes a grant, but rather that a grant is proved by presumptive evidence, that the law permits the jury to weigh the evidence, and upon such *presumptive—not positive*—proof to find the fact. In such a case it is not for the court to direct or instruct the jury to presume a grant, but to instruct them that they may upon such evidence find a grant to have been made, that such evidence legally tends to prove the grant by presumption from circumstances, and in the particular class of cases, *stands in place of positive proof*.

We do not understand that there is still a third class of cases, in which, although the grant is not presumed by the court as pure matter of law, and is not found by the jury as a fact; still the court may direct the jury to presume the grant, and thus by the intervention of the jury, but without the exercise of their judgment upon the evidence, establish the grant as if it were a mere

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inference of the law. Language may be found in some books and decisions favoring such a view, but the doctrine is clearly against the whole current of English and American decisions and tends to confound the proper and separate jurisdictions of court and jury. This erroneous view, we think, has arisen from the want of precision in language, when treating of such presumptive evidence and the grants proved by or presumed from it.

In cases *not within the statute of limitations* grants are presumed or proved by mere length of possession and without auxiliary circumstances; thus where the *claimant* is not within the statute, such is *The U. V. M. v. Reynolds*, 3 Vt. 542; where the *subject matter* is not included in the statute, such as easements; or where from the *relation of the parties*, such as tenancies in common, the possession is not *prima facie* adverse. In such cases courts presume grants in analogy to the statute of limitations. Sometimes these presumptions are held to be conclusive, at others open to be rebutted. The line between conclusive and disputable presumptions is not well defined.

There is another class of cases where a grant or surrender will be presumed; where in the execution of trusts and to prevent a just title from being defeated by mere matter of form, a defendant is not permitted to set up an outstanding title in a nominal trustee to defeat the real title of the *cestui que trust*; courts of law going upon the ground of courts of equity, that as the trustee is compellable to deed, they will presume that done which ought to be done; 7 T. R. 2; 4 T. R. 682; Bull. N. P. 110; 12 Ves. 251; 6 Wheat. 481; 4 J. C. R. 1. These seem to stand upon grounds peculiar to themselves, and are sometimes set up to sustain the legal title, irrespective of long possession.

In cases *within the statute of limitations* mere length of possession, unaccompanied by other circumstances, is not sufficient to raise the presumption of a grant. Where possession has existed for the length of time prescribed by the statute, it becomes a bar by the operation of the statute; if for a less time, it must be aided by other circumstances or the presumption cannot arise, *Sumner v. Child*, 2 Com. 620; 2 Phil. Ev. 356, (Cow. & Hill's Notes;) 1 Greenlf. Ev. sec. 17. But where there has been a long and uninterrupted possession of land consistent with the

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grant to be presumed, and there are other circumstances which make it reasonable to believe that such grant was actually made, but through great lapse of time or other causes, the proper evidence of such grant cannot be found and is probably lost or destroyed, there the presumptive evidence is admitted to prove the grant. The reasons for admitting such evidence to supply the lack of the ordinary and positive proof of title are very clearly set forth in the opinion of ARCHER, J., in *Beal's lessee v. Lynn*, 6 Harr. & Johns. 361. He says: "Presumption is often resorted to for the purpose of supplying defective evidence, and in this country is not oftener applied to any subject than to supply defective title to lands. It would be difficult to make out the titles to many of the older tracts of lands in this State, by a regular deduction of title deeds, from the patentees down to the present proprietors, without resorting in some stage of them, to presumption. Records may sometimes be lost or destroyed, ancient title papers may be defectively executed, or the proof of them from lapse of time may be impossible, yet in all these cases the possession may have been invariably in the person claiming the land, and in those from whom he derives his title. In such cases, possession which has long been undisturbed, and which is in general the concomitant of title, induces a belief in the mind of title little short of that which would be produced by the adduction of the most undeniable and best authenticated evidences of right. In general, these presumptions are bottomed upon the existence of certain facts, which can leave but little doubt upon the mind of the truth of the fact which we are called upon to presume. They frequently, too, derive their force and efficacy from that vigilance with which the law guards ancient possessions, which sooner than they should be disturbed, presumes that they had in contract a rightful commencement."

So Judge STORY in *Ricard v. Williams*, 7 Wheat. 59, says, "Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title and the public policy of supporting long and uninterrupted possession. They are founded upon the consideration that the facts could not, according to the ordinary course of human affairs, occur unless there was a transmission of title to the party

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in possession. Nor is it necessary to produce any direct or positive proof either of the existence or the loss of the instrument so proven by presumptive evidence, where from great lapse of time the instrument may well be presumed to have been lost and the circumstances and corresponding possession prove that it once existed. Thus Lord MANSFIELD, in the case of *The Mayor of Hull v. Herner*, Cowp. 103, says: "In the case of as supposed by-law usage is allowed to support it, without any proof of the existence of such a by-law, or of the loss of it. But the principle is a right one, viz: in favor of rights which parties have been long in the peaceable and quiet possession of. I have myself taken it to be established in point of law that though the record be not produced, nor any proof of its being lost, yet under circumstances it may be left to the jury whether there is not sufficient ground to presume a charter." Again, "if a foundation can be laid that a deed or record existed and was afterwards lost, it may be supplied by the next best evidence to be had; or if it cannot be shown that it ever existed, yet enjoyment under a title that can only be by record is strong evidence to be left to a jury that it did once exist."

The books abound with cases in which deeds and grants have been presumed from possession and attending circumstances, where there has been no proof of the existence or loss of the instruments presumed, except what such possession and circumstances furnish. The following are referred to to show that circumstances similar to those shown in this case have been considered as admissible to go to the jury for the purpose of raising such presumptions:—*Jackson v. Murray*, 7 Johns. 5; *Jackson v. Lunn*, 3 Johns. Cas. 109; *Jackson v. Russell*, 4 Wend. 543; *Farrar v. Merrill*, 1 Greenlf. 17; *Jackson v. McCall*, 10 Johns. 377; *Beal's lessee, v. Lynn*, 6 Har. & Johns. 361; *Sumner v. Child*, 2 Conn. 631, citing *Bush v. Bradley*, 10 Johns. 475; *Schauber v. Jackson*, 2 Wend. 14. The rule in equity is the same as to the nature and tendency of the circumstances which raise the presumption; *Bunce v. Walcott*, 2 Conn. 27; 12 Ves. 239; 4 J. C. R. 1. In this State possession for eighteen years and an agreement for a lease, and the right of the lessor to other land depending on the agreement, were held admissible to author-

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ize a jury to presume a life lease, although the lessor testified that he had not given one; *Sellick v. Starr*, 5 Vt. 255. In *Stevens v. Griffith*, 3 Vt. 448, the plaintiff in ejectment claimed under E. Fisk, an original proprietor by deed from Fisk to Bishop and from Bishop to the plaintiff in 1770. The last deed was not acknowledged, and there was no proof of the death of the witnesses, or of their handwriting or that of the grantor; but there was a certificate in 1784 to an unauthorized proof of its execution before a justice of the peace, and a record of the deed by the town clerk. The court held that the deed and the certificates were admissible in connection with parol evidence to show that Stevens claimed to own the right of Fisk, attended proprietors' meetings, paid taxes on the right, and that no other person ever claimed or voted on the right, but there was no evidence that Stevens had had possession of any lands under the right; HUTCHINSON C. J. "Here was a total abandonment by Fisk from the time he conveyed to Bishop, and a well known claim of Stevens sufficiently ancient to afford the presumption of a grant, or so many and such grants as would vest the title in Stevens, and more so still to afford the presumption of the execution of the deed to Stevens of 1770."

Without any further notice in detail of particular cases, it may be said that the entire current of authority shows that deeds and grants of lands may be shown by presumptive evidence as well as any other, where there has been a possession corresponding to the grant, and where auxiliary circumstances exist making it reasonable to believe that such deed or grant has in fact been made, and where the circumstances are not equally consistent with the non-existence of a grant. It is in determining whether the possession and the circumstances shown in this case tend to show that such a deed existed, and whether they may as reasonably be accounted for on the theory that there was no deed as that there was one, that the chief difficulty arises. We proceed to consider the plaintiff's objections under this head.

1. It is claimed that the possession by Ira Allen of the first seven divisions of this right, claiming to hold them under the deed from Youngs of 1773 does not tend to show that the deed was in fact ever made, because there has been no possession by

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Allen, or any other person, of the eighth division lot claiming under the deed.

If the plaintiff had sued Allen or any one under him for the first seven division lots, it is certain that he could have shown his possession of them, claiming under the deed, with the other circumstances offered in evidence here, as presumptive evidence of the existence and execution of the deed. The proof would have been admissible to go to the jury to convince them there was a deed from Youngs to Allen. If on the proof they had found that the deed really existed, it is clear that they must also have found that by that deed the whole right was conveyed and not merely the first seven division lots. The deed conveys Youngs' right. All the circumstances shown in aid of the possession, (and without which possession is inadequate to raise the presumption of a deed) point to the deed of 1773 conveying the whole right, and to no other or different grant. If in such a suit Allen got title by possession only, then indeed he would get title only to the first seven division lots; but he gets title through *his deed*, which his possession and the other circumstances prove to exist. And where he gets title by his deed he gets title to all his deed covers. It would be absurd to say Allen proves that he had a deed of the whole right, but he gets title through it only to what he possessed, and loses the rest though the deed conveyed it. So if this defendant, though not connected with Allen's title, shows the same facts that Allen might show in a suit against him and by presumption proves the existence of the deed, that must of necessity show the title to the whole right out of the plaintiff. The deed cannot be good to convey part, and inoperative as to the rest. The deed once proved, and it is no matter whether this is done by positive or presumptive evidence, it conveys whatever its language conveys, and is to be treated and construed like any other deed.

The question cannot be affected by inquiring who it is that offers the evidence, and whether he claims under the deed, for that point has already been disposed of in the examination of the right of the defendant to show an outstanding title by presumptive evidence. The question is simply whether the evidence offered tends to prove the existence of the deed. On this subject

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we are not left to reasoning alone. We think the authorities are ample to show that if a deed conveying an entire tract or several different parcels is sought to be proved by presumptive evidence, possession by the grantee of a part of the tract, or of some of the parcels, claiming under the deed, is evidence to prove its existence in a suit in which the title to a portion of the tract or to a separate parcel, comes in question, although there has been no actual possession of the portion or separate parcel sued for.

In *Hazard v. Martin*, 2 Vt. 77, the deed was void without an order of sale. Presumptive evidence was offered to show that the order was made. The deed covered the reversion of the widow's dower and the two-thirds of the farm. Long and peaceable possession had been had of the two-thirds, but no possession of the reversion. It was objected that the possession of the two-thirds did not tend to show the deed valid as to the reversion, and was not admissible in that suit which was only for the reversion. The opinion of HUTCHINSON, J., is full and direct on this point. He says, "If the deed were valid at all, as a deed, it gave as good a title to the reversion as to the other two-thirds. All who could ever set up any claim against the deed, could set it up as effectually with regard to the two-thirds, at any time before the statute of limitations had run against them, as they could with regard to the one-third after the decease of the widow. And they as fully yielded to the validity of the deed while the plaintiff possessed two-thirds under it, as if he, during the same period, had possessed the whole farm."

This clearly puts the force of the presumption on the ground that possession of part under the deed and non-claim by the other party shows an acquiescence in the deed. Hence he proceeds, "the statute of limitations would not affect the title while the widow lived; but the deed acquired validity every year. If it conveyed a good title to anything, it did to all conveyed by it."

In *Doolittle v. Holton*, 26 Vt. 588, a similar question came up, and the opinion of Judge HUTCHINSON in *Hazard v. Martin*, was examined, and as to its bearing on this point, the opinion of the court was suspended. But in the same case, 28 Vt. 819, the charge of the county court upon a new trial was, "that as it appeared that other lands of the estate not covered by the dower

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were included in the administrator's deed, and that such other lands had been held and possessed under the same deed adversely to the heirs and without any claim on the part of the heirs for so great a length of time, it was evidence tending to raise a presumption in favor of the validity and regularity of the proceedings in the probate court and the sale by the administrator." Of the charge thus given the supreme court approved, REDFIELD, Ch. J., saying, "we could not suggest any improvement in the mode in which the county court have carried out the purpose of this court in granting a new trial." In the recent case, *Colchester v. Culver*, 29 Vt. 111, it became necessary to show that a deed defective in not having a seal, and therefore not entitled to registry, was executed. The deed as recorded conveyed several lots in Colchester, to one of which the heirs of the grantor now made claim.

The court, in considering the evidence tending to show that the deed was in fact executed, after saying that the original deed could not be produced, nor any witness that had ever seen it, speak of the evidence that the grantee under the deed took possession of one of the lots described in the deed, and that the heirs of the grantor had, during the whole time of that possession, laid no claim to the lot, as tending to show that the grantor had executed the deed. There had been no possession by the grantee of the lot claimed by the heirs. The court say, "If the evidence is sufficient to establish the deed as to a part of the premises, it is as to all."

These decisions seem to have settled the question in this State. See also *Jackson v. Murray*, 7 Johns. 5; *Jackson v. Lunn*, 3 Johns. Cas. 109; *Jackson v. Davis*, 5 Cow. 127-8.

2. It is also said that the entry of the deed on the proprietors' records in 1795, does not tend to show that such a deed existed. Standing alone it would not, otherwise the record of a deed not entitled to registry would have the effect of a record of one duly executed. But this entry of record is to be considered in connection with the other facts proved.

It is the characteristic of circumstantial evidence that while the circumstances taken singly and separately prove little or nothing, all of them together harmonize and point to a result, which the mind must adopt as necessarily following from the coinci-

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dence of all the facts, all so coinciding that they cannot reasonably be accounted for without the result. Of this entry on the record it is to be observed that it is an ancient one, free from suspicion, made on the records of the proprietors of whom Youngs was one, made at a time when the lands had not been divided and when the proprietors would be expected soon to resort to the records in making division of their lands. It cannot be doubted that the clerk would not allow such a record to be made on his books unless he had such a deed before him. We must reasonably presume that Ira Allen, who soon after had possession of the lands, and whose deed from Heman is recorded at the same date, left this deed for record with the clerk. In 1798 we find that the proprietors at legal meetings for dividing their lands investigate the subject in order to ascertain what rights Allen owned, report that he owned Youngs' right and that he then possessed lands equivalent to the first seven divisions of that right, (that is three hundred and twenty out of three hundred and forty-three acres,) refer to the records and other documents to show his title, and finally set all the lots belonging to this right in common with twenty-eight other rights which Allen owned, to Allen, so that in fact no division was made among these twenty-nine rights of Allen, but they were all set to him as if he had originally been named in the charter as the proprietor of twenty-nine rights. The proprietors could not lawfully do this unless 1st, Allen did own the twenty-nine rights, and 2d, he or others under him had at that time the actual possession of all these lots. By the old statute regulating the division of lands among proprietors, they could only vote to settlers lots in lieu of their draft when the lots were "settled on, lived on, improved;" such are the words of the old act. Now although the record has no force as a record, is not notice as a record, still the entry of it on the book of records in connection with all the other facts above referred to, and the long possession of Allen, must be regarded as evidence of his claim and color of title. It has been held in this State that a pitch or survey on record, an unrecorded deed, a contract to purchase may be shown as evidence of claim of title. 2 Aik. 155; 14 Vt. 400; 12 Vt. 251. See also Ang. on Lim. sec. 404 and notes.

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Even a verbal claim of title limits, extends and qualifies possession.

In this aspect the entry on record and the proceedings of the proprietors are very important, as showing the character of Allen's possession, that it was not only under a claim consistent with the grant to be presumed, but inconsistent with the non-existence of the grant, facts without which, as Judge STORY says in *Ricard v. Williams*, the pre-emption cannot fairly arise.

In admitting the record of this deed in connection with the possession and the other circumstances, we cannot overlook the fact that the deed was executed long ago, in 1773, that the defendant never had the custody of it, that from the great lapse of time it may reasonably be supposed to be lost. In the admission of presumptive evidence to supply defects in title, courts are much and reasonably influenced by such considerations.

The difficulty of proving by witnesses the execution of a deed after a long period of time has led to the adoption of the rule, that after thirty years deeds produced from their proper custody and accompanied by possession, may be received without further proof. If the original of this deed could be found among the papers of Ira Allen it could be produced and read without further proof, though never acknowledged and recorded. Yet one cannot but perceive that the security against fraud and imposition would be much less in the admission of such an original than in the admission of the copy here offered, which was spread upon the proprietors' records for the inspection of the world at a time when the attention of the proprietors was called to their titles and to the divisions of their lands, and which has been followed by an undisputed possession for fifty years. It is the long and undisputed possession which, to use the words of Judge PHELPS in *Wells v. Morse*, in the 11 Vt. "gives to evidence slight and unsatisfactory in itself, a peculiar force, such as renders it a satisfactory ground of adjudication."

So Mr. Phillips, in his *Treatise on Evidence*, Vol. 1, p. 457, says "when possession has gone along with a deed for many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence though not proved to be true, because in such case it may be impossible to give better evidence."

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Such entries of record, when connected with other facts, are admissible, upon the ground that they are themselves acts done at the time and having a necessary or natural connection with other circumstances, all pointing to the execution of the deed. They derive their force, not from their being in any sense legal records, but as acts and declarations made at the time and accompanying the possession.

As authorities for the admission of such evidence, see *Allen's lessee v. Parish*, 3 Hamm. 107 ; 4 Binn. 314 ; 2 Harr. and Johns. 380, 402 ; and the remarks of Judge KELLOGG in *Williams v. Bass*. 22 Vt. 355, that a copy from the record of an unsealed deed if followed by possession would be presumptive evidence of its existence. In *Brown v. Edson* 23 Vt. 435, the exclusion of the copies of the deed is put on the ground that there was no possession according to the deed, that the presumption was to extend title, not to establish a deed by corresponding possession. In the report of the case the evidence as to the acquiescence is not reported, but the remarks of Ch. J. REDFIELD show that by it the possession was limited to the line acquiesced in and so there was no possession either actual or constructive of the land as to which the grant was sought to be presumed. It is evident in that case if the deeds on record had been followed and sustained by possession, that they would have been treated in such connection and with the proof as to the acquiescence of the proprietors as evidence tending to prove a grant by presumption.

3. It is said the proprietors' records are not evidence. But the plaintiff was a proprietor, legally notified to attend the meetings and bound by their action in dividing the lands. The division was made on the basis that Allen owned and possessed the lands belonging to this right. If he did not own the right the proceedings were illegal and a wrong to the plaintiff. Yet from 1798 to 1849 she made no objection to the proceedings and never claimed the right. Her disability to sue does not extend so as to preclude her from acquiescence in the division. Though a married woman, she was bound by the legal acts of the proprietors in dividing the town, and by acquiescence in a practical division by them. It was the duty of the proprietors to ascertain what lots settlers lived on and under what rights, in order to make a

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proper division. But in doing this they found it difficult, perhaps impossible, to tell what the particular right was under which the settlers under Allen claimed their lots, as in his deeds to them he had not described the names of the proprietors. Hence they divided the forty-one rights Allen did not own into severalty, but left the twenty-nine rights he did own to Allen severed from the other forty-one rights, but not severed as between themselves, leaving him and the settlers under him to divide these lands as they saw fit. This was a most unequivocal recognition of Allen's title to and possession of the lands set to these twenty-nine rights. If any other person was the true owner of any one of these twenty-nine rights, such a division was as to him illegal and unjust.

Nor is this all. At these meetings at which the plaintiff, if a proprietor, was constructively present, the proprietors, after full inquiry on the point, by express vote declare Allen to be the owner of Youngs' right, and that he or settlers under him were in possession of three hundred and twenty of the three hundred and forty-three acres belonging to it.

In the eye of the law the plaintiff was present at these meetings if she was then a proprietor. If the owner of this right she must have known her lands were about to be divided, yet for fifty-one years she never objected to the division or claimed the first seven division lots. That this non-claim shows acquiescence in these proceedings and clearly tends thereby to show the transmission of the title from Youngs to Allen, seems very clear to us, and the only way in which she is to be relieved from the force of the acquiescence is that she was a married woman and could not acquiesce. But the fact that infants and married women owned proprietary rights in townships has never been held to prevent their being bound by the acts of the proprietors at legal meetings in making a division, or by subsequent acquiescence in a division. A contrary doctrine would have made divisions among proprietors almost impracticable. Her exemption from the effect of adverse possession by the statute of limitations, does not relieve her from the natural conclusion to be drawn from her acquiescence in such a division. If she did not seek to have her lands severed from Allen's, but left them to be held in common with him,

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the reasonable conclusion is that she knew them to have been conveyed to Allen.

We think, therefore, that the evidence all tended to raise the presumption of an actual grant of the right from Youngs to Allen.

If the evidence so tended and the defendant was precluded from showing the fact, then there was error in the refusal of the county court to weigh the evidence and decide whether such deed was actually made.

IV. The defendant claims that the court should have raised the presumption as a pure inference of law from the circumstances proved, and have held it as conclusive.

Without referring in detail to the numerous authorities on this point, we deem it sufficient to say that we think the presumption as to the deed must be one of fact. The plaintiff claims that there are circumstances to rebut the presumption, and of these and their legitimate force as evidences he cannot be deprived.

The cases of *Hazard v. Martin*, *Sellich v. Starr*, *Doolittle v. Holton*, and others, show that in this State such a presumption of a grant as is here claimed is one of fact and not of law. When the testimony is all on one side and nothing to rebut the evidence tending to raise the presumption, the court may of course direct a verdict, as in any other case where a *prima facie* case is made and nothing to show the contrary. But this is not such a case.

V. The will having been approved by the probate court, and nothing appearing to show that the court did not have jurisdiction, its jurisdiction will be sustained. It is presumed to have jurisdiction till the contrary appears.

The objections to the certificate authenticating the probate of the will in New York, should have been taken in the probate court. The decree of the probate court admitting the will to probate here, cannot be assailed in this collateral manner.

Judgment reversed and case remanded for a new trial.

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THOMAS ELWELL v. JOSEPH MARTIN AND Trustee, LORENZO
HALL.

Infant. Assumpsit. Trustee process.

An infant is liable in assumpsit for money had and received for money tortiously taken by him.

And in such an action a debt due to the infant may be attached and held by the trustee process.

In construing the statute (Comp. Stat., p. 256, sec. 1.) specifying what actions may be brought by the trustee process, the expression "*founded on any contract*," relates solely to the *form* of the action.

ASSUMPSIT for money had and received. Plea, the general issue, and trial by the court, at the September Term, 1858, in Chittenden county,—BENNETT, J., presiding.

The suit was brought to the March Term, 1858, and was tried upon a case stated by which it was admitted that on the 22d of September, 1857, the defendant tortiously, and without the plaintiff's knowledge or consent, took from the latter one hundred and ninety dollars in bank bills and specie, belonging to the plaintiff, and never returned the same to the plaintiff, nor paid him therefor.

The defendant was a minor until June 30th, 1858.

The defendant never recognized the plaintiff's claim as valid, nor in any way promised to pay it, unless from the facts above recited the law implied a promise upon which the action brought could be sustained.

After the case stated was agreed upon, the defendant filed a motion to dismiss the action on the ground that it could not properly be brought by way of the trustee process, because the facts showed that it was not founded upon any contract, express or implied.

But the court overruled the motion to dismiss, and rendered judgment for the plaintiff for one hundred and ninety dollars, and interest from September 22d, 1857, to both of which decisions the defendant excepted.

L. E. Chittenden and William G. Shaw, for the defendant.

1. No contract is absolutely binding upon an infant except one

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for necessities. Every other contract is either void or voidable at his election; 1 Am. Lead. Cases 244; 1 Parsons' Cont. 244; Chitty on Cont. 141.

The plaintiff, by bringing his action for money had and received, has entirely *waived* the tort, and put the case upon the same ground as though the defendant had, without wrong, received money belonging to the plaintiff which he has neglected to pay over; *Fisher v. Jail Commissioners*, 3 Vt. 328; *Conant v. Raymond*, 2 Aikens 243; *Young v. Marshall*, 8 Bing. 43, 21 E. C. L. 215; *Lamb v. Clark*, 5 Pick. 193; *Miller v. Miller*, 7 Pick. 133; *Jackson v. Mayo*, 11 Mass. 147.

The theories on which the two actions of assumpsit and tort for the tortious taking of money are based, are entirely different. The measure of damages is different in the two actions. In the action of tort it is the injury to the plaintiff; in that of assumpsit it is the benefit to the defendant.

This action then, as brought by the defendant, cannot be said to be substantially the same as an action of tort would be for taking the same money. As brought, it rests solely on a contract footing, and being unconnected in any way with necessities for the infant, it is not binding upon him; 20 American Jurist 266; *Merriam v. Cunningham*, 11 Cushing 43; 1 Parsons on Cont. 267.

An infant can make no express contract which is binding upon him *as such*; *Earle v. Reed*, 10 Metcalf 387; *Bradley v. Pratt*, 23 Vt. 378. A promissory note or other express contract by an infant to repay money received by him, even for the purpose of buying necessities, is voidable; 1 Parsons on Cont. 246. So also if the note is given as a compensation for the infant's torts; *Hanks v. Deal*, 3 McCord 237, cited in 1 Parsons on Cont. 264.

Therefore, in this case, if the infant after the tort had made an express promise to repay the money to the plaintiff, an action could not have been maintained against him thereon if he chose to avoid it. Can it be that an express promise is weaker than an implied one to do the same thing? Is it possible that the law will *imply* a binding contract against an infant contrary to his will, when it will not enforce his express and voluntary contract, based upon the same consideration, and pointing to precisely the same result as such supposed implied contract?

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2. But if the action of assumpsit can be sustained at all against an infant under these circumstances, it must be sustained upon the ground that though the action is *in form ex contractu*, it is really *ex delicto* in substance.

Upon this ground we claim that this action cannot properly be brought by way of the trustee process, because it is not *founded* upon contract, express or implied, and that, being so brought, it should be dismissed; *Hill v. Whitney*, 16 Vt. 461; *Ferris v. Ferris*, 25 Vt. 100; *Tarbell v. Bradley*, 27 Vt. 535; *Preston v. Hutchinson*, 29 Vt. 144; *Barker v. Esty & Trustee*, 19 Vt. 131.

George F. Edmunds and *J. French*, for the plaintiff.

1. The liability of an infant for his acts does not depend upon the form of action brought in respect thereto. His liability cannot be enlarged by the adoption of a form *ex delicto*; neither can it be diminished by the adoption of a form *ex contractu*, which is adapted to the case. His immunities and responsibilities depend upon the nature of his acts, not on the form of pleading. As the law does not allow the *form* of remedy to diminish his right as an infant, neither does it allow it to diminish his responsibility.

The principle on which the immunity of an infant rests, is founded solely on his supposed inability to cope with the mature mind of full age in making contracts; hence, it is his contracts *made* by him, that are supposed to be invalid.

It seems clear therefore, that when the law raises a promise from an act for which he is confessedly responsible, and in respect to which he has no protection from his non-age, he can be sued on such promise and compelled to pay damages for its non-performance. His want of capacity does not enter into such a promise. It is a promise which the law makes for him, and the law has no infirmity; *Bingham on Infancy* 261; *Bristow v. Eastman*, 1 Espinasse N. P. C. 172; *Oliver v. McClellan*, 14 U. S. Dig. 366, sec. 36; *Wood v. Vance*, 1 Nott & McCord, 2 U. S. Dig. 541, sec. 167; 1 Am. Lead. Cases 247-261; 2 Greenleaf's Ev. 235.

2. The motion to dismiss was properly overruled. The statute declares that "all actions founded on contract, express or implied, may be commenced by the trustee process." The single and

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simple question then is, is the action of assumpsit for money had and received, and supported by evidence of a promise implied by law to repay money surreptitiously taken, an action founded on contract, express or implied?

The question seems to answer itself; *Fisher v. The Jail Commissioners*, 3 Vt. 328.

ALDIS, J. The defendant, a minor, tortiously and without the knowledge or consent of the plaintiff, took from him one hundred and ninety dollars in money; is he liable therefor in assumpsit for money had and received?

It is admitted that if he were an adult he would be so liable. Where property has been tortiously taken and converted into money, the plaintiff may sue in tort, or he may waive the tort and sue in assumpsit. When it is said that he waives the tort, it is not meant that he does any act or makes any averment in his declaration to that effect. He simply brings assumpsit instead of trespass or trover, and thereby foregoes the advantage he would have if he sued tortwise to claim higher or exemplary damages, and to proceed against the person of the defendant. By bringing assumpsit he pursues a remedy milder and more favorable to the defendant. The defendant cannot be worse, and may be better off by being sued *ex contractu*. Such is the law as applicable to adults.

It is also admitted that the defendant is liable for the tort, and that the damages recoverable in an action *ex delicto*, cannot be less than the money tortiously taken, which would be the measure of damages in assumpsit. But it is claimed that although infancy is no bar to the cause of action in tort, although the infant is fully liable for the tort, still if the plaintiff elect to sue in assumpsit, then the infant, on account of the form of action, can plead his infancy in bar of the suit.

The plea of infancy is allowed to protect the infant from imposition, to shield him against the consequences of his inexperience and ignorance. Hence, his express promises do not bind him. Even for necessities, which he must have or otherwise he would starve, he is not liable by virtue of any express promise; for if he promise to pay an unreasonable price for them, he is not bound by

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such promise, but only to pay a reasonable price, which is *implied*.

As infancy does not protect him from the consequences of, and liability for his tortious acts, why should it furnish him with a defence against them when sued *ex contractu*, instead of *ex delicto*. The right to elect the form of action belongs to the plaintiff. The infant cannot be injured, but may be benefited by being sued in assumpsit. Why may not an infant be allowed to have a milder remedy brought against him as well as adult tortfeasors?

The promise upon which he is made liable is not an express one. The law implies it from the wrongful act. It is not a contract in which he may have been cheated and against which infancy shields him, but a willful wrong which he has committed against another, and in which the law implies the obligation to make restitution. Here the necessity is to protect, not the infant, but society.

The plea should cease when the reason for it ceases.

Although the form of action is assumpsit, yet the substance is in tort, and when the substance is made to appear by proof, we see no reason why the form of action which is favorable to the infant may not be maintained. In the substance of the proceedings there is no anomaly, and none as to the form which is not fully answered by allowing such suits to stand against adults.

The action we think is fairly sustained by authority; *Bristow v. Eastman*, reported in 1 Esp. 172, and in Peake 223, is an authority to show that an infant who has embezzled money may be sued for it in assumpsit.

As reported in *Espinasse* it is a direct decision on the point. In *Peake* it is said that the plaintiff proved that the defendant acknowledged the fraud and promised to pay after he came of age, so that the point was not determined. In this view it is but the doctrine of Lord KENTON. We notice, however, that the case is much more fully reported in *Espinasse*, and seems to bear upon its face the marks of greater accuracy, and a more thorough knowledge of the case.

The doctrine then held by Lord KENTON, that an infant is liable in assumpsit for money he has embezzled, has been recognized and adopted by several elementary writers on the subject of infancy; by Judge REEVE, in his *Domestic Relations* 246;

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by Prof. GREENLEAF, 2 Greenleaf's Ev. sec. 368, and by Story on Contracts, p. 64. It is questioned upon what seems to us insufficient ground in an article in the American Jurist, January, 1839. See also Bingh. on Infancy, p. 111. and 1 Am. Leading Cases 261.

The defendant has cited several cases to show that to sue in assumpsit the plaintiff must waive the tort, and that then the case must proceed as if the money was received without wrong, and the defendant only liable for a breach of contract. Such is unquestionably the theory of the law, and the principle is recognized in the cases cited; *Conant v. Raymond*, 2 Aik. 243; *Fisher v. Jail Commissioners*, 3 Vt. 328; *Young v. Marshall & Poland*, 21 E. C. L. 215, (8 Bingh. 43.)

But this does not settle the question here at issue, whether an infant tortiously taking money can plead infancy in bar, when sued in assumpsit, for the validity of a plea as a defence may, and ordinarily should turn, not upon the form of the action, but its substantial merit. Indeed, the language of Ch. J. TINDAL, in the case last cited, shows upon what grounds, and why, a party may waive the tort, and the reasons assigned show that it may as well be waived in the case of an infant as of an adult. He speaks of it as a general rule, that "no party is bound to sue in tort, where, by converting the action into an action of contract, *he does not prejudice the defendant*, and generally speaking, it is more favorable to the defendant to be sued in contract."

In the same case, BOSANQUET and ALDERSON, Judges, say^t that by waiving the tort the plaintiff does not affirm the wrongful acts of the defendant, but merely waives his claim to damages for the wrong, and is content to sue for the proceeds of the wrongful act.

Our attention has also been called to the principle generally recognized and established in this State in *West v. Moore*, 14 Vt. 449, that where the liability really arises by breach of a contract, though accompanied by fraud or tort, the plaintiff shall not be allowed to change the form of action and hold the infant liable *ex delicto* for the tort. The reason of these decisions stands upon the plain ground of protecting the infant against his liabilities really arising upon contract. In tort the infant might be liable

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for greater damages than upon contract, and when the substantive cause of action is upon a contract, he ought not to be liable at all. The cases under this head are numerous. Sometimes it is difficult to tell which most preponderates, the contract or the tort, and the rule which has been sometimes applied as a tort, that the conversion must be willful, and not constructive, by breach of the contract, seems just in theory, though very difficult in practical application. See the cases on this point collected in 1 Am. Lead. Cases 260, *et seq.*

But it by no means follows that because an infant may not be made liable for his contracts by changing the form of action to tort, that he shall not therefore be made liable *ex contractu*, where he is in fact liable for his wrongful acts, and the law implies from them in all other cases the promise and the duty of making restitution. To extend to an infant the privilege of defeating his legal liability by setting up his infancy as a defence, not to the cause of action, but to the form in which it is declared upon, would not, we think, be a reasonable conclusion from the acknowledged principles upon which the privilege of infancy is granted to him, and is not required by any of the rules regulating the forms of action. On the contrary, it would convert the shield into a sword.

II. It is urged also by the defendant that the trustee process will not lie in such a case, as the statute provides that trustee suits may only be brought upon actions founded upon contract.

In the construction of this and similar statutes, our courts have always held that the form of action should govern, and they have not gone behind the form of action to ascertain whether the cause of action was originally *ex delicto* or *ex contractu*. Thus, in *Fisher v. Jail Commissioners*, 3 Vt. 330, the court hold, that if one is sued in assumpsit for tortiously taking goods and converting them into money, he comes within the provisions of the act allowing persons imprisoned upon judgments recovered in actions founded on contract, to take the poor debtor's oath, and that the form of action determines the right.

The judgment of the county court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WASHINGTON,
AT THE
AUGUST TERM, 1859.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE,
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. LUKE P. POLAND, }
HON. ASA O. ALDIS, }

GEORGE H. GUERNSEY v. DANIEL W. PITKIN.

Schools.

A requirement by the teacher of a district school, that the scholars in grammar shall write English compositions, is a reasonable one; and if such scholar, in the absence of any request from his parents that he may be excused from so doing, refuse to comply with such a requirement, he may be expelled from school on that account.

It seems also that such requirement would be reasonable and proper in the case of the scholars in a majority of the studies prescribed for district schools by the statute. REDFIELD, Ch. J.

Guernsey v. Pitkin.

CASE. Plea not guilty and trial by the court, at the March Term, 1859, BARRETT, J., presiding.

The following facts appeared on trial:

The defendant, during the winter of 1857-8, was the prudential committee of a school district, in which the plaintiff, who was then eighteen years of age, resided with his father. The defendant, as such prudential committee, employed a teacher to teach the school in that district, and the plaintiff began to attend the school as a scholar at its commencement, with the purpose of attending through the term, and that he commenced the studies of arithmetic, geography, grammar, reading and writing and intended to pursue them through the term,

Soon after the commencement of the term the teacher required all the scholars in grammar to write compositions regularly during the term, but the plaintiff declined to yield to the requirement, whereupon the teacher informed the defendant, as committee, of the fact, and he visited the school, and there had conversation with the plaintiff, relative to the teacher's requirement, and advised him to yield to it for his own good, as a means of improvement as a scholar; but the plaintiff did not say whether he would do so or not. The defendant then told the teacher he would see the plaintiff's father on the subject, and have him send the teacher word that he didn't wish to have the plaintiff write compositions, and that if he did so, she need not require it of the plaintiff. The plaintiff came to school the next day, and the teacher asked him if he had brought word from his father, to which he replied that he had not. The teacher then requested him to go to his father and see if he had not some word to send to her on the subject; whereupon the plaintiff went, and on returning told her that his father said that he had not any business with her, and that if she had any business with him she must come and see him. The plaintiff's father sent no word to her at any time except the above.

Shortly afterwards the defendant, as committee, asked the plaintiff if he would write compositions as required by the teacher, to which he answered that he thought not. The defendant, therefore, as such committee, told the plaintiff that he must not come to school unless he would obey the regulations, and instructed

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the teacher if he came not to treat him as a scholar unless he obeyed the regulations in respect to writing compositions, or brought a line from his father that he did not wish him to do so. The other scholars of the school obeyed the requirements in this respect, and presented their compositions at the appointed times. The plaintiff declined to do so and did not write any compositions.

The plaintiff continued to attend the school for about three weeks, but in consequence of his declining to obey the requirement in regard to compositions, and not bringing any request as aforesaid from his father, the teacher, acting upon the instructions of the committee, ceased to instruct him, and when he took his place in the class to recite lessons, as he did in some instances, she declined to hear him recite, and when he called on her, as he did in several instances, for assistance in arithmetic, she declined to assist him, saying to him that she did not regard him as a scholar of the school.

In consequence of the teacher thus declining to instruct him, and to recognize him as a scholar, he shortly afterward stopped attending the school.

It appeared that the plaintiff possessed ordinary capacity and was a fair proficient in penmanship. The only reason he assigned to the teacher for declining to write as required, was that he never had written compositions.

It appeared that the town superintendent of common schools, when the teacher was examined for certificate, and on other occasions, advised declamation and composition to be practiced in the schools.

It did not appear that any fault was imputed to the plaintiff, as a scholar, except in his declining to obey the requirement to write compositions.

From these facts the court found that the requirement of the teacher in regard to compositions was reasonable and proper, and that by judicious means, she endeavored to induce the plaintiff to comply therewith, and that there was no sufficient reason for his not complying with it.

The court further found that if the father of the plaintiff had requested the teacher not to require the plaintiff to write compo-

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sitions, he would have been excused therefrom, and also that the teacher ceased to instruct the plaintiff as a scholar, acting under the directions of the defendant as committee, as above stated, and for the reason solely that the plaintiff refused to obey the requirement to write compositions, and brought no request from his father that he might be excused from so doing, and that the plaintiff left the school solely on account of the teacher's refusal to instruct him as above mentioned, and upon these facts the court rendered judgment for the defendant, to which the plaintiff excepted.

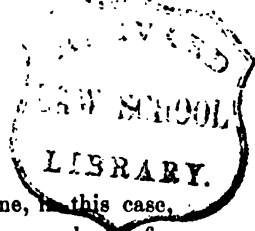
J. A. Wing, for the plaintiff.

Peck & Colby, for the defendant.

REDFIELD, Ch. J. We are called to determine, in this case, the propriety of excluding a pupil from the common schools, for refusing to write compositions, as it is called. This will depend upon the reasonableness of the requirement. Persons will no doubt differ very considerably in regard to the benefit or wisdom of such a course of instruction in the common schools. There is, no doubt, of late, in some quarters, manifested a disposition to push the extent of instruction in the common schools altogether beyond anything which had been dreamed of when the system was inaugurated. And it is impossible to determine how far it may or may not be carried hereafter. The thing is important and will always be popular, and in such cases the natural tendency is onward. And we feel no disposition to check this onward progress so long as it is conducted with due regard to the legislative provisions upon the subject.

The statute requires "each organized town to keep and support one or more schools, provided with competent teachers, of good morals, for the instruction of the young in orthography, reading, writing, english grammar, geography, arithmetic, history of the United States, and good behavior."

It is not necessary to inquire into the propriety of extending the course of instruction in the common schools, maintained at the public expense beyond this, so as to include those branches



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taught in the academies and colleges. There is certainly great reason to question the propriety and even the legality of such an extension. And still it may be more useful and more of general public concern than some things which are done at the public expense. It is too important and difficult a subject to be discussed gratuitously.

But in regard to those branches which are required to be taught in the public schools, the prudential committee and the teachers must of necessity have some discretion as to the order of teaching them, the pupils who shall be allowed to pursue them, and the mode in which they shall be taught. If this were not so, it would be impossible to classify the pupils, or for one teacher to attend to more than ten or twelve pupils.

With this concession to the teacher of fixing the mode of teaching these branches, it seems very obvious that English composition may fairly be regarded as an allowable mode of teaching many of these branches.

It is questionable how far writing should be confined to the mere forms of letters, even if we admit that that may have probably been the primary sense in which it was introduced into the statute. We must still admit that as time advances and improved modes are adopted and those branches become extended, the sense of the terms must also extend. The joining of letters into words and of words into sentences, with the use of capitals and punctuation and correct English, is indispensable to any practical use of writing. And this is composition.

So, too, grammar is more effectually taught by exercises in writing than in any other mode. This is now almost the exclusive mode of teaching the grammar of the classical languages, and the modern European languages. And it is certainly an allowable, and I have no doubt a most efficient mode of teaching English grammar. And this is composition.

The same thing may be said of some of the other branches named in the statute. Orthography signifies literally writing correctly. And composition is the only mode of securing correct orthography in a mode to be of practical utility.

So, too, geography and history are but different forms of writing, and are often most effectually fixed in the memory of the pupil

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by requiring him to write out from memory his lessons for the day, or the week past, and sometimes a brief abstract of the lessons for a longer period. And these are but different modes of English composition.

So that in regard to instruction in the specified branches of common school education, the writing of English composition in different forms may be regarded as an allowable mode of teaching the majority of them.

There is truth and force in Lord Bacon's apothegm, wherein he reduces all learning to three processes, reading, writing and speaking. "Reading makes a full man, writing a correct man, and speaking a ready man."

Judgment affirmed.

GEORGE B. PIERCE v. THE ESTATE OF CHARLES PAINE.*Witness.*

The plaintiff brought a suit at law against P., who afterwards, in July, 1853, died, and the suit was, therefore, discontinued under the statute, and the same claim presented before the commissioners on P's estate. *Held*, in an appeal from the decision of the commissioners, that the plaintiff was not a competent witness.

ASSUMPSIT. Plea the general issue and trial by jury at the September Term, 1858, BARRETT, J., presiding.

On trial the plaintiff offered himself as a witness, and the defendant claimed he was not competent to testify in this case. It appeared that the plaintiff commenced a suit against the testator upon the same claim for which this action was brought, that the testator died on the 15th of July, 1853, during the pendency of the original suit, that his estate was represented insolvent, and commissioners appointed thereon, that the suit was accordingly discontinued, and the plaintiff's claim presented before the commissioners on the testator's estate, and that the present action was an appeal from their decision.

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The county court allowed the plaintiff to testify, to which the defendant excepted.

T. P. Redfield and *H. Carpenter*, for the defendant.

Peck & Colby, for the plaintiff.

BENNETT, J. If we are to regard this suit as pending at the time of the passage of the act of 1852, making the parties witnesses, it falls within the decision in the case of *Kimball v. Estate of Baxter*, 27 Vt. 630, and we have no disposition to disturb that case, or question its soundness.

The suit was commenced against the testator prior to the passage of the act of 1852.

He died in July, 1853, by which the suit was discontinued before the court of common law, and the claim prosecuted before commissioners, and the question is, shall we consider the prosecution of this claim before the commissioners as a continuation of the same suit, so far as to give an operation to the saving clause in the act of 1853.

I. The act of 1852 had a proviso that it was not to affect suits then pending. By the act of 1853 this proviso was repealed except where one of the parties had died before the passage of the act of 1853. The object in limiting the operation of the repeal of the proviso in the act of 1852 in cases where one of the parties had died, was no doubt, as was somewhat significantly expressed at the bar, to keep the parties upon an *evener*, as to suits pending in 1852.

The statute of 1852 at first did not change the law of evidence as to suits then pending. The act of 1853 did change it as to suits then pending at the passage of the act of 1852, only where both parties were living at the time of passing the act of 1853. This was a reasonable provision and should be carried out in its spirit.

With reference to giving effect to this statute we apprehend it is no stretch of authority to consider the suit before commissioners, as in substance the same as that pending against Gov. Paine in his lifetime. The statute in effect simply changes the *forum*.

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The trial proceeds on the same principles and costs follow the event in each forum.

The statute does not declare that by the death of the defendant the suit is abated, but simply declares that upon the estate being represented insolvent, and upon commissioners being appointed, the suit before the common law court shall be discontinued, and the matter go before commissioners, and then the costs in the common law court follow the result. There is to be no discontinuance until the estate is represented insolvent and commissioners have been appointed.

In a case where the statute of limitations had run, or rather the six years had elapsed after the suit was brought and before the death of the defendant, I apprehend the statute could not be used to bar the claim before the commissioners. The court would, I should apprehend, treat the prosecution of the claim before the commissioners as a continuation of the first suit, so far as the statute of limitations was concerned. It is true that in the case of *Austin v. Slade's Administrator*, 3 Vt. 68, it was held that a deposition taken to be used in an action pending in the county court upon a note of hand, could not upon the decease of the defendant be used before the commissioners upon the question as to the allowance of the note, and the court seem to go upon the ground that it was not the same suit as that upon which the deposition was taken to be used. But we all know that the course of decision in this State had been very strict in regard to the admission of depositions. They were treated as a species of testimony not sanctioned by the common law and were not to be favored, and unless they came strictly within the provisions of the statute they were rejected. The statute was construed most strictly, according to its letter.

The *forum* was undoubtedly not the same in that case, and as the statute requires the authority taking the deposition to certify the court before which the deposition was to be used; this may have been a sufficient reason for the rejection of the deposition. At all events we think the case in the 3 Vt. should not govern one not like it in all its material facts.

The judgment of the county court is reversed and the case remanded.

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STACY COURTIS v. MARCUS CANE and WILLIAM CANE.

Trover.

If one, in good faith, purchase and subsequently sell stolen goods, he is liable in trover to the owner without a demand and refusal.

TROVER for a quantity of dress silk goods. Plea not guilty and trial by jury at the March Term, 1859,—BARRETT, J., presiding.

The plaintiff gave evidence tending to show that his store in Boston, Massachusetts, was broken open on the night of November 22d, 1855, and that a large quantity of dress silks belonging to him were stolen therefrom, and that the defendants, who were merchants and partners trading in silks and other fancy goods, in the city of New York, and at the same time engaged in peddling in Vermont, about the first of March, 1856, sold at Waterbury, in this State, some of the silks which had been stolen from the plaintiff's store, as above mentioned, and which were described in the plaintiff's declaration.

The defendants introduced evidence tending to show that they purchased the silks in question, together with many other goods of similar description, of Strauss & Son, merchants, in New York on the 11th of January, 1856.

* No evidence was introduced to show that the defendants had any of the goods in question in their possession at the time of the commencement of this suit, or that any demand of them was made by the plaintiff upon the defendants before the suit was brought.

The county court, among other things not excepted to, charged the jury that if they found that the goods in question were stolen from the plaintiff's store, as his evidence tended to prove, and that he had not otherwise parted with them, and that the defendants had sold them, the plaintiff was entitled to recover their value without regard to the fact whether the defendants purchased them in good faith of Strauss & Son or not, and notwithstanding the plaintiff had not proved a demand upon and refusal by the defendants to deliver the goods prior to the commencement of this suit.

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The defendants excepted to this part of the charge of the court, and the jury returned a verdict for the plaintiff.

Peck & Colby, for the defendants.

Dillingham & Durant, for the plaintiff.

POLAND, J. The jury have found that the goods for which the suit was brought were stolen from the plaintiff, and that he never parted with his property in them. The defendants claim that they purchased them honestly of Strauss & Son in New York. If this were so, the defendants gained no title by the purchase, because Strauss & Son could convey none; the sole title was in the plaintiff. The thief, whoever he might be, could convey no title because he had none, and the same difficulty would continue to exist in all subsequent sales of the property, deriving title from this source. An honest purchaser could not be charged criminally because innocent of any criminal intent; but the real owner may avail himself of all civil remedies provided by law for the protection of property. /

The law is settled beyond all question by repeated cases to this extent, and has been carried much beyond it in very many. In *Stanley v. Gaylord*, 1 Cush. 536, it was decided that if the bailor of a chattel, who has no authority as against the bailor to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage, the bailor may maintain an action of trespass therefor against him without a previous demand. The opinion of the court was delivered by METCALF, J., who made a very careful and elaborate examination of all the authorities and cases where the rights of purchasers from vendors who had no right to sell, and the rights and remedies of the real owners of the property have been considered. WILDE, J., dissented, but only upon the ground that as the defendant, who had not disposed of the property, derived his title honestly from one lawfully in possession, the plaintiff could not maintain trespass, but only an action of trover, after a demand and refusal. *Hyde v. Noble*, 13 N. H. 494, was very similar in its circumstances to the case in Cushing, but the action was trover, and it was held maintainable without any demand upon the defendant.

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In *Hoffman v. Carew*, 20 Wend. 21 and 22 Wend. 285, it was decided that an auctioneer to whom stolen goods were forwarded by the thief for sale, and who sold them and paid the proceeds to the thief, without notice of the theft, was liable to the owner in trover without demand and refusal.

✓ The soundness of this last decision is conceded not only by the majority of the court, in the case in Cushing, but fully acceded to by WILDE, J., in his dissenting opinion. Probably no case can be found to conflict with it, and the charge in the present case was entirely in harmony with the law on the subject.

No demand was necessary, because the sale of the goods by the defendants was an actual conversion, and where there has been an actual conversion by the defendant, a demand is never necessary.*

X It is only where no actual conversion has been made by the defendant of the property, that it is necessary to make a demand, and that for the purpose of furnishing evidence of a conversion. See cases above cited and also *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King et al.*, 14 Vt. 367. ✓

Judgment affirmed.

GEO. A. THAYER & CO. v. HORACE C. BALLOU.

Contract. Sale.

The defendant purchased goods of the plaintiffs, each party supposing that a credit of six months was given, but this supposition rested on the mutual but erroneous belief that the credit of a third party had also been pledged for the purchase; *Held*, that the vendors could not on the discovery of the mistake as to the liability of the third party, treat the sale as one for cash, and maintain an action in book account or assumpsit for the price of the goods, before the expiration of the six months.

* NOTE.—Independently of the sale of the goods by the defendants, it seems that the mere purchase and receipt of them from Strauss & Son amounted to a conversion. 1 Chitty's Plead. 154; *Baldwin v. Cole*, 6 Mod. 212; *McCombie v. Davis*, 6 East 538; *Bristol v. Burt*, 7 Johns. 254; *Hyde v. Noble*, 13 N. H. 494; *Stanley v. Gaylord*, 1 Cush. 547.—REPORTER.

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BOOK ACCOUNT. The auditor reported the following facts:

The writ was served on the 24th of November, 1857, and the plaintiffs claimed to recover the amount of three bills of goods purchased of them in Boston by the defendant's agent, one Dodge, on the 3d of September, the 11th of September, and the 8th of October, 1857, respectively.

The sale and delivery of the goods as charged was admitted by the defendant, but he claimed that they were purchased upon a credit of six months, and therefore that this action was prematurely brought.

About the 1st of September, 1857, the defendant proposed to open a boot and shoe store in Montpelier. He was without property and credit, but his father, Eli Ballou, was pecuniarily responsible, and, without however having any pecuniary interest in the business, proposed to aid the defendant in procuring a stock of goods, and for that purpose went to Boston, taking with him one Dodge, who was the defendant's agent, to purchase a stock.

Eli Ballou had interviews with several boot and shoe dealers in Boston, and among them one Whitcomb, the plaintiffs' clerk, and gave them assurances that whatever goods should be selected by Dodge for the defendant at their respective stores, should be paid for. The goods charged in the plaintiffs' account were delivered upon this assurance of Eli Ballou, and without it the sale would not have been made. The goods, however, were charged by the plaintiffs directly to the defendant, and to him alone.

Eli Ballou, at his interview with Whitcomb, above referred to, told him that the defendant was without property, and would expect "a credit" or "time," but the matter was then left indefinite and uncertain whether any goods would be purchased of the plaintiffs.

Nothing was said between the plaintiffs or Whitcomb and Dodge, or Eli Ballou, as to any particular time of credit upon which these goods were purchased. The plaintiffs and Dodge both expected that Eli Ballou would call upon the plaintiffs and make some more definite arrangement in regard to the goods before they were delivered, but being called away on other business he did not do so. The plaintiffs expressed some disappointment because he did not call, but Dodge affirmed that Eli Ballou

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was entirely responsible, and the first bill of goods was thereupon delivered without objection. The plaintiffs were aware that Dodge had selected other goods at other houses, that Eli Ballou had in some form become responsible, and that a credit (in most cases of six months) had been given.

The auditor further reported that he did not find that any express agreement was made between the plaintiffs and Dodge, or any person acting for the defendant, to give the latter an absolute credit of six months; but that he did find that the purpose of Eli Ballou and of Dodge was to purchase on credit; that allusion was made by Dodge, at the time these goods were selected, to his purchases at other houses upon a credit of six months, and that from what was said and done at that time the plaintiffs expected to give, and they supposed Dodge expected to receive, in behalf of the defendant, a credit of six months; and that this understanding or mutual expectation of the parties was in a great measure to be referred to the fact that the defendant was represented as without capital, and under the necessity of obtaining goods upon a credit, and paying by the resales. At the same time the plaintiffs supposed that Eli Ballou was ready at any time to assume a legal liability to pay for the goods in question; and indeed that he was then already under such a liability; and the expectation on the part of the plaintiffs of giving a credit, and on the part of Dodge of receiving one, rested on the mutual belief that Eli Ballou's credit had been actually pledged for the purchase.

The goods charged under the date of September 11th, and October 8th, were delivered upon written orders of the same dates. No other communication was had between the parties in regard to these goods except these orders, which contained nothing concerning a credit. When Dodge selected the first bill of goods he remarked to the plaintiffs that the defendant might wish to order some goods from time to time, and the plaintiffs replied that if he did so they would do well by him, or "would do the fair thing," but nothing was said about a credit. The auditor, however, found that the plaintiffs expected to give, and the defendant to receive a credit of six months, at the time these orders were filled, but that both in regard to these bills and the first one,

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the plaintiffs never intended to tie themselves so that they could not sue for the debt at any time, if it became precarious.

Soon after the three parcels of goods had been delivered, the plaintiffs sent a note to the defendant, dated September 9th, 1857, for the amount of the plaintiffs' account, payable to the order of the defendant, in six months from date, without interest, with the request that the defendant would procure his father's signature, and indorse the note himself, and return it to the plaintiffs. The defendant signed the note himself, and returned it to the plaintiffs, with notice that his father declined to sign it. The note was immediately sent to Heaton & Reed, as attorneys for the plaintiffs, with notice that they declined to accept the note, and directing them to return it to the defendant; and soon after, Whitcomb, in behalf of the plaintiffs, went to Montpelier to obtain security for the debt, and applied to the defendant and his father for security. Eli Ballou declined to sign any note for the debt, or assume any legal obligation to pay the same, but admitted that he "gave his word," and that he should feel morally bound to pay the debt if the defendant did not. The plaintiffs immediately commenced this suit, and returned to the defendant his note.

When Whitcomb came to Montpelier for the purpose of seeing if the debt was secure, and Eli Ballou declined to assume any legal liability, the latter proposed to Whitcomb that he would cause the defendant to deliver to Whitcomb the goods bought of the plaintiffs that were on hand, and pay for what had been sold, but Whitcomb declined this proposition.

Upon this report, the county court, at the March Term, 1859, —BARRETT, J., presiding,— rendered judgment *pro forma* for the plaintiffs, to which the defendant excepted.

J. A. Wing, for the defendant.

Heaton & Reed, for the plaintiffs.

ALDIS, J. The questions presented to us depend rather upon the construction to be given to the auditor's report, than upon the principles of law applicable to the facts found by the auditor.

If an absolute credit of six months was given to the defendant, it is clear the plaintiffs cannot recover.

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If the contract was, a credit for six months if Eli Ballou's guaranty was furnished, but no credit for any period of time if his guaranty was not furnished, then the plaintiffs can recover.

These conflicting constructions are put upon the report.

The auditor says, that when Eli Ballou and Whitcomb had their interview, Ballou told Whitcomb that the defendant had no property, and would expect "a credit" or "time." When the goods were selected by Dodge (the defendant's agent) at the plaintiffs' store, he alluded to his purchases at other houses upon a credit of six months. The defendant was represented as without capital, and under the necessity of obtaining goods upon a credit, and paying by the resales. This testimony tended to prove the conclusion to which the auditor states that he came, viz: that the plaintiffs expected to give, and supposed Dodge expected to receive, on behalf of the defendant, a credit of six months. This mutual understanding of the parties made a contract, though no express agreement was made in form or in words. So far, then, the minds of the parties met. And this mutual understanding was derived from what was said between them on the subject, and from putting a natural construction on what was said. It was not mere conjecture or expectation formed in silence and without premises to sustain it.

Was this understanding qualified by the condition, that if Eli Ballou did not give his guaranty, then the sale was not to be upon time? The auditor says that the plaintiffs did not notify the defendant, or Dodge, or Eli Ballou, that the credit would depend on Eli Ballou's becoming legally liable for the debt, and that there was no conversation about it. We are unable to find from the report that there was any evidence tending to show anything said or done from which either party could have gotten such an understanding. "The plaintiffs never intended to tie themselves so that they could not sue for the debt at any time, if it became precarious;" but this intent seems to have been kept to themselves, not communicated to any one, and to have been inconsistent with what was said and expected as to the six months credit.

The auditor also says, that the expectation of giving a credit on the part of the plaintiffs, and of receiving it on the part of Dodge, rested on the mutual belief that the credit of Eli Ballou

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had been given, and, substantially, that but for this belief the plaintiffs would not have sold the goods.

The report further shows, that the credit of Ballou had not been given, that there was no fraud, false representation or artifice of any kind on the part of Ballou or Dodge, or the defendant, indeed, that nothing was said or done to lead the plaintiffs into the error. Whether they mistook the law and supposed Ballou's word legally bound him, or whether they misapprehended what he said and supposed he was pledging his credit by an original and not a collateral undertaking, does not clearly appear. However the mistake arose, it appears to have been without fault on either side, and to have been shared alike by the plaintiffs and the defendant's agent. Now this is the most favorable view of the report that can be taken for the plaintiffs. Upon the discovery of the mistake what would be the respective rights of the parties? Could the plaintiffs say with justice, "the basis upon which I gave and you received the credit having failed, I have the right to treat it as a sale for cash, and demand immediate payment?" The defendant might reply, "the mistake was as much yours as mine, more even, for it was for you and not for me to know with certainty what security you had for the sale of the goods; again, if I had not had the six months credit I should not have bought the goods." What did transpire between the parties on finding out their error, relieves us from the necessity of deciding as to these conflicting claims. Eli Ballou offered to return the goods on hand, and to pay for those sold. The plaintiffs refused this offer, and soon after, and without further demand, brought this suit. Clearly, they had no right to say you shall keep the goods, and shall pay us down for them. That would be visiting the mistake upon the defendant, as if it was his fault. If it gave the plaintiffs any right to treat the whole sale as a mistake and the contract as being ended, they could not reasonably ask the defendant to do more than to pay for the goods sold and return the residue. The plaintiffs would not do this, substantially would not take back the goods. If they would not put an end to the contract, clearly they could not make one for the defendant to suit themselves. If they chose to stand on contract, they could stand only on the contract as made. Between

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affirming the existing contract, or putting an end to it and taking back the goods, there was no middle ground.

Again, if the defendant had been in fault, (as by using false representations, etc.,) that would not have enabled the plaintiffs to have sued in assumpsit, or book account, till the expiration of the six months credit. So are all the authorities; 18 Vt. 235; 16 Vt. 108 and 164.

Much less could the plaintiffs sue in such forms of action when there was no fault on the defendant's part. A mutual and innocent mistake ought not to put the defendant in a worse condition than an actual fraud.

It is said the plaintiffs might recover for the goods sold.

1. The report does not show that any goods were sold. The defendant's father offered to return the goods on hand and pay for what had been sold, and that is all that appears upon that point in the report.

2. After such offer and refusal of it by the plaintiffs, clearly they would have no right to sue till they had offered to take back the residue of the goods, and had demanded pay for those sold. Without this there would be no disaffirmance of the contract; we do not decide that with it the action would have been maintainable.

The decision in *Hickling v. Hardy*, 7 Taunton 311, stands upon a ground wholly distinct from the principle here involved. The defendant bought goods and gave the plaintiff a bill in payment. When the bill was presented for acceptance it was protested for non-acceptance. What then was the right of the drawee? To sue instantly for the amount of the bill. That was the meaning of the contract. Now as to credit for the goods, that case shows none given but what was implied in taking the bill. The contract implied, in commercial law, from that was, if the bill is accepted the vendor shall have his pay when the bill matures, if not accepted he shall have his pay when acceptance is refused. That decision stands upon the implied contract of the parties. If there had been any express contract for credit for a definite period of time, it would have altered the case.

In the view we take of this case the judgment must be reversed, and judgment rendered for the defendant.

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THE STATE OF VERMONT v. PATRICK MAHON.

Criminal Law. Evidence.

In criminal prosecutions, if the government introduce as evidence against the respondent, a statement of his in regard to his connection with the crime or the subject of the crime, the respondent is entitled to have the whole of such statement disclosed to the jury. The jury, however, are not bound to give equal credit to the whole statement, but it is for them to decide how much of it, under all the circumstances of the case, they will believe.

INFORMATION in three counts; two for horse stealing, and one for stealing a harness. Plea not guilty, and trial by jury, at the March Term, 1859,—BARRETT, J., presiding.

On the trial the government gave evidence tending to prove that the horse and harness in question were stolen at some time between ten o'clock of the night of the 24th of December, 1858, and the next morning at daylight, from the owner's stable in Northfield; that they were found with a sleigh attached, standing about sunrise on the morning of the 25th, under a shed in Marshfield village, about twenty-six miles from Northfield; that there were upon the horse an overcoat and a neck shawl, in place of a blanket; that there was a pair of buckskin gloves in the sleigh, but no buffalo robe; that that night and morning were exceedingly cold, the thermometer being at eighteen degrees below zero; that the respondent was at Northfield centre village in the evening of the 24th of December, some time before ten o'clock, and spoke for lodgings at the public house there for that night, and soon went out, saying to the landlord that he would be in soon, but did not return; that in the morning of the 25th, for about three miles on the road leading from Montpelier to Marshfield village, the respondent was seen by several persons going towards Marshfield village with the horse and sleigh aforesaid; that when the horse and sleigh were thus discovered standing under the shed, one of the witnesses went to the tavern of A. H. Davis, about fifteen rods from the shed, and there found the respondent sitting by the stove and two or three other persons in the room, and there made inquiry of those persons and of the respondent about the horse, whose it was and how it came there,

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and that none of them knew, and the respondent said that he had no horse.

That afterwards, on further inquiry by the witness and others, the respondent said that he had slept in the barn at Putnam's tavern the night before, about two miles from Marshfield village, that he had left the barn that morning, and when about twenty rods from it, on his way to Marshfield village, a man overtook him with this horse and sleigh and asked him to ride, and he got in and rode till they arrived at this shed, when the man drove in and got out of the sleigh, and handed him his overcoat and told him to hitch the horse, and put the overcoat on it, and left, saying that he would be back in a short time; that he (respondent) waited a few minutes for his return, but being cold, and the man not returning, he went to the tavern, where he was found as aforesaid, and, as it turned out on examination, with his feet and lower part of his legs badly frozen.

On being inquired of about the overcoat and gloves, the respondent said they were not his. The evidence also tended to show that a paper of tobacco was found in the overcoat pocket, which, on being shown him, and on being asked whose it was, he said was his, and on inquiry how it came in that pocket, he said he didn't know, that he might have handed it to the man for a chew. The evidence also tended to show that on being taken to Putnam's tavern, and being requested to point out the place where he slept in the barn, and how he got in, he undertook to do so, but pointed out a place into which he could not have got, and where he could not have lodged in the manner stated by him.

On the cross examination of some of the witnesses introduced by the government, their testimony tended to show that the coat and gloves above mentioned were somewhat too large for the respondent.

The government also gave evidence tending to show that when the respondent was brought to jail from Marshfield, he wore this overcoat, that it was hung up in the jail, that after the respondent had been there awhile, the jailor discovered him in the act of tearing up and strewing about the jail some woollen garment, and thereupon asked the respondent what that meant, and what he

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was doing, whereto the respondent replied that he was tearing up his old overcoat, that he had got through using it, and did not want anything more of it. The jailor testified that this was the same coat that the respondent wore when he was brought to jail as aforesaid.

The respondent introduced evidence tending to show that he was at Davis' tavern in Marshfield on Tuesday before the 25th of December, 1858, and then had not any overcoat with him, and that on the 25th of December he wore a pair of mittens.

The court charged the jury fully in respect to all the points in the case arising upon the law and evidence, to which no exception was taken, except as follows: In view of a point made by the counsel for the respondent in arguing the case to the jury, the court told the jury that the mere fact taken by itself, that the coat and gloves were too large for the respondent, did not of itself tend to prove that a man came with the respondent to the shed in the manner stated by him, that this fact was consistent with his story in this respect, and so would not operate to his prejudice.

The court also charged the jury that the government, having proved what the respondent said, as tending to show that he came to Marshfield with the stolen property, it was proper that all he said at the time in relation to the matter should be stated by the witnesses, but that the jury were not bound to regard it as all true; that they would consider what he thus said in connection with the other evidence, as well as in its intrinsic credibility, and if they disbelieved any part of his story as proved by the witnesses, they would treat such part accordingly; if they believed the whole story, it showed that he was honestly connected with the property; if they disbelieved the account given by him of the manner in which he became connected with the property, that part of his story would not inure to his relief by way of rebutting the presumption arising from the stolen property being found in his possession.

The counsel for the respondent requested the court to charge the jury that if the government relied on the admission of the respondent, to prove the stolen property to be in his possession, they must take the whole story as true and be bound by it accord-

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ingly. The court declined so to charge, and to the charge as given in the respects above specified, and to the refusal of the court to charge as requested, the respondent excepted.

C. W. Willard and *S. B. Colby*, for the respondent.

———, for the prosecution.

POLAND, J. The county court were clearly correct in charging the jury that they were not bound to give equal credit to all parts of the defendant's story in relation to his connection with the stolen property. The defendant had the right to have all that he said upon that subject at that time received and weighed by the jury as evidence, that which made the connection to be innocent and honest, as well as that which admitted any connection at all, and so the court told the jury. Mr. Greenleaf says in his treatise on Ev., Vol. 1, sec. 201, "But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, yet it does not follow that all parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him." A very large number of cases are cited in a note to the same section, in support of the doctrine. It is a rule laid down by all writers on the law of evidence, and is one of the best settled and most familiar rules of evidence. The reason why an admission of a party against himself is received as evidence against him, is said to be the improbability that he would make it unless it was true. This reason would not apply to such portions of an admission as makes in favor of the party, but still fairness requires that all the statement should be received as the party makes it, and with all the qualifications he sees fit to attach to it. But in considering the actual degree of credit to be given to the several parts of a statement or admission, the judgment could not fail to be influenced in many cases by the different influences and effect of the different parts of the statement upon the interests of the party. If parts of the statement, especially

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those in favor of the party, be contradicted by other evidence, or are improbable or inconsistent, a jury might be authorized to disbelieve them, and still believe the residue of the statement.

The defendant's counsel assume that the court treated it as a conceded or undisputed fact that the defendant came to Marshfield with the horse, and had the horse in his possession there, and cast the burden upon the defendant to rebut the legal inference arising from that fact. But we think the bill of exceptions will not properly admit of such a construction. The exceptions state that "the court charged the jury fully upon all points arising upon the law and evidence, to which no exception was taken except as follows." The exceptions then proceed to state the charge as to the effect of the defendant's admission, how it was to be weighed, and the fact of the coat and gloves being too large for the defendant.

It is to be inferred from the exceptions that in this part of the charge not excepted to, the jury were fully and properly charged upon all the evidence in the case tending to show that the defendant came to Marshfield with the horse, or the contrary, and whether he came alone with the horse or whether another man took the horse there, and the defendant was merely a passenger and rode with him. This is apparent from the manner in which the Judge commences the charge, upon the effect of the defendant's admission. "That the government having proved what the respondent said as tending to show that he came to Marshfield with the stolen property, etc."

The only evidence in the case tending to prove that another person drove the horse there, and that the defendant merely rode with him a short distance, was the naked statement of the defendant himself, and very many of the facts stated go strongly to the conclusion that that part of his story was a mere fabrication, and, if it was, there would not seem to have been any ground to doubt that the defendant came there with the horse, and had the horse in his possession there.

What is said in the charge as to the result of finding the defendant's story about another man to be false, is to be considered in reference to the jury's having already found that the defendant came there with the horse, and therefore alone. We do not see how any legal inference could be drawn from the size

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of the coat and gloves found with the horse, that another man drove him there, or how any more effect could be given to that fact than the charge authorized. We are not able to discern why the case was not properly submitted to the jury upon the evidence. The respondent's exceptions are therefore overruled.

CYRUS J. S. SCOTT AND ISAAC N. HALL, *plaintiffs in error*, v.
RAWSEL R. KEITH, DANIEL BALDWIN AND ORAMEL H.
SMITH, *defendants in error*.

Contract. Consideration. Pleading.

Several persons, not partners, were jointly indebted to K., and three of them executed a written promise to the others that if the latter would pay K. the whole of his claim they would settle with him for their share. This promise contained no distinct words indicating a several liability on the part of the promissors. Those to whom this promise was made paid K. his whole claim, and afterwards brought assumpsit against the others, declaring upon their promise. The declaration contained no allegation that any balance had been struck or agreed upon as the share of the defendants, but merely alleged that their share was a certain sum; *Held*, on demurrer to the declaration, that the promise of the defendants to the plaintiffs was a joint, and not a several one; that it was based upon a sufficient consideration; and that the parties did not stand in such relations to each other as rendered it necessary to aver that any balance had been agreed upon as the defendants' share of the debt.

WRIT OF ERROR. The writ set forth a copy of the record of a judgment in favor of the defendants in error against the plaintiffs in error, by which it appeared that at the March Term, 1857, the former commenced an action of assumpsit against the latter and one Jacob Kent of the State of Illinois, with the following declaration:

"In a plea of the case, for that by an act of the legislature of the State of Vermont, approved November 13th, A. D. 1849, a corporation by the name of the Montpelier and Connecticut River Railroad Company was duly created, in and by which the said

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Rawsel R. Keith, Daniel Baldwin, Oramel H. Smith, Cyrus J. S. Scott, Jacob Kent, Jr., and Isaac N. Hall, together with one Joseph A. Wing, of Plainfield, in the county of Washington, and one Joseph Potts, then of Groton, in the county of Caledonia, were duly appointed commissioners to receive subscriptions for the capital stock of said company, and said commissioners were duly authorized by said act to cause such preliminary explorations and surveys to be made as they might deem expedient. And the plaintiffs aver that afterwards, to wit, on the 4th day of March, A. D. 1850, the said Keith, Baldwin, Smith, Scott, Kent, Hall and Wing duly accepted said trust, to wit, at Montpelier, in the county of Washington. And the plaintiffs further aver. that afterwards, to wit, on the day and year last aforesaid, at Montpelier aforesaid, said commissioners last named deemed it expedient that a preliminary exploration and survey of the route for a railroad, contemplated by said act, from said Montpelier to Wells River, should be made, and then and there employed one Archibald Kennedy, then of Waterbury, in the county of Washington, to make said preliminary exploration and survey of said railroad route. And the plaintiffs further aver, that afterwards, to wit, on the 29th day of September, A. D. 1850, at Montpelier, in the county of Washington, said Kennedy made and completed said preliminary exploration and survey of said railroad route, and that there was then and there due to the said Archibald Kennedy therefor, a large sum of money, to wit, the sum of five hundred and eighty-two dollars and sixteen cents. And the plaintiffs further aver, that afterwards, to wit, on the 29th day of September, A. D. 1850, at Wells River, in the county of Orange, in consideration that the plaintiffs would pay to said Kennedy said sum of five hundred and eighty-two dollars and sixteen cents, they, the defendants, then and there promised the plaintiffs, by a writing hereunto annexed, to pay them, the plaintiffs, their, the defendants', share of said sum, when thereto requested. And the plaintiffs aver, that afterwards, to wit, on the 30th day of September, A. D. 1850, at Montpelier, in the county of Washington, relying upon the said promise and undertaking of the defendants, they did then and there pay to said Kennedy said sum of five hundred and eighty-two dollars and sixteen cents,

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and that the share of the defendants to pay of said sum then and there amounted to the sum of two hundred and ninety-one dollars and eight cents, of which the defendants then and there had notice, and then and there became liable to pay to the plaintiffs said last mentioned sum when thereto requested, according to the tenor and effect of their said promise and undertaking in this behalf. Yet the defendants not regarding their said promise and undertaking in this behalf, made as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the plaintiffs in that behalf, have not, nor hath either of them paid said sum of money or any part thereof to the plaintiffs, although so to do the defendants were requested by the plaintiffs afterwards, to wit, on the day and year last aforesaid, at Montpelier aforesaid, but they so to do have hitherto wholly refused and still do refuse."

"MESSRS. KEITH, BALDWIN AND SMITH,

Sirs:—Pay A. Kennedy the balance of his account for surveying the Montpelier and Conn. R. Railroad, and we will settle with you for our share.

WELLS RIVER, Sept 29, 1850.

C. J. S. SCOTT.

(Signed)

J. KENT, JR.

ISAAC N. HALL."

That this writ was served upon the plaintiffs in error, and returned *non est* as to Kent; that the plaintiffs in error demurred to the aforesaid declaration, and that the county court, at the September Term, 1857, overruled the demurrer, adjudged the declaration sufficient and rendered judgment for the defendants in error for four hundred and thirteen dollars and forty-eight cents damages and costs, which judgment the plaintiffs in error claimed was erroneous, because the declaration aforesaid was not sufficient, and they prayed that the same might be reversed and set aside.

Peck & Colby, for the plaintiffs in error.

O. H. Smith, for the defendants in error.

POLAND, J. The plaintiffs in error claim that the judgment below was erroneous upon three grounds.

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1. That the written promise upon which the action was brought was a several promise by each defendant to pay his individual share of the debt to Kennedy, and not a joint undertaking by the three to pay the aggregate of all their shares.

2. That if the promise can be regarded as joint, it is not supported by any sufficient consideration.

3. That no action will lie upon it, because no balance was struck or sum agreed upon as the share of the defendants.

1. The facts set out in the declaration in relation to the origin of the debt to Kennedy, show a joint liability by the plaintiffs, the defendants, and Mr. Wing, to Kennedy for five hundred and eighty-two dollars and sixteen cents, and in the absence of proof of a different ratio of liability, the legal presumption would be that they were liable equally, so that if one paid the whole each of the others would be liable to contribute his equal proportion to reimburse the one paying. This implied liability to contribute would be several, and not joint. But the defendants, by their writing, said to the plaintiffs that if they would pay the whole the defendants would pay their share.

The form of the defendants promise is *joint*, and none of the ordinary words used to make a contract several are inserted. The general rule of law undoubtedly is, that whenever several persons agree to perform a particular act, they are bound *jointly* and not *severally*, in the absence of express words creating a several liability, and any number of persons may bind themselves jointly for the performance of one entire duty, and so become in effect sureties for one another for the performance of the thing contracted to be done. See Addison on Contracts 966-7; Chitty on Con. 98.

Whether a promise or contract made or signed by several persons is joint or several, like every other question on the construction of a contract, depends mainly upon what appears to have been the intention and understanding of the parties, to be gathered from the language of the whole instrument and its subject matter. Mere words of plurality alone will not render a contract joint when the parties engage for the performance of distinct and several duties, and the whole instrument shows that the intention must have been to make the obligation *several*, and not joint.

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But where several persons contract together for the performance of a particular act, in order to make their liability several, the intention must be made apparent by express words; Add. on Con. *ub. sup.*

Now in this promise of the defendants to the plaintiffs, there are no proper words of severalty, and the only ground upon which it can be argued that the parties did not intend to be bound jointly, is that the defendants would only be liable severally to make contribution to either one who should pay the whole debt. The amount of the several liability of each was not thereby increased, only they became virtually by a joint promise sureties for each other. But while the debt was unpaid to Kennedy they stood each liable for the whole amount to him, and sureties for each other for the whole, so that they were really lessening the extent of their liability by this new contract. The intent of the defendants to become bound jointly, and for an entire sum, is strengthened some, we think, by the form of the promise, "we will settle our share." If they had said *our shares*," it would have appeared more like an intention to remain only severally liable. We are of opinion that there is nothing in the language or subject matter of the contract that will authorize us to overcome the presumption arising from the *entire* and *joint* form of obligation used.

2. As this construction of the writing creates a different legal liability from that under which the defendants stood before, it must be supported by a consideration. The defendants below say that as the plaintiffs, before this promise was made, were under a legal obligation to pay their proportions of the debt to Kennedy, and Kennedy might enforce collection of the whole from either one or all of them, therefore, the voluntary payment of the whole by the plaintiffs below, at the request of the defendants, was no consideration whatever. The plaintiffs below were not bound voluntarily to raise the money and pay the whole, as between them and the defendants; they were only bound to raise their proportions, and though Kennedy might collect the whole of the plaintiffs below, or one of them, he might also collect the whole of the defendants, and compel them to resort to their remedies for contribution.

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The raising the money by the plaintiffs below and extinguishing the whole debt to Kennedy, was an act which as between the plaintiffs and the defendants the former were not bound to do, and was an act which might prove detrimental to the plaintiffs, and beneficial to the defendants, and therefore a sufficient consideration to support a promise by the defendants below was founded upon its having been done at their request.

3. Was the declaration defective in not alleging that the sum due Kennedy had been divided, and the share of the defendants ascertained?

The declaration avers that their share was a certain sum, two hundred and ninety-one dollars and eight cents. It does not allege that a balance had been struck, and this sum agreed on by the parties, but even if this were necessary to be done in order to make a legal severance, we think it doubtful, at least, whether it would be necessary to allege it in the declaration.

The declaration states as an allegation of fact, that the defendants' share was a certain sum, and this implies that it has been legally ascertained; if it had not, it would rather be an objection to the proof than to the declaration.

But we do not rest the decision upon this ground, as we think this case does not come within the class where it has been decided to be necessary that a balance shall be struck before any action except one for an account can be maintained. The defendants have cited and rely on this point upon *Beach v. Hotchkiss*, 2 Conn. 425, and *Casey v. Brush*, 2 Caine's 293.

The doctrine of both those cases is substantially this: that an action of assumpsit will not lie between partners for a balance due upon their partnership, unless the account has been previously liquidated and a balance struck. The soundness of these decisions is obvious, for until the partnership accounts have been settled, and the balance ascertained, the matter is in no suitable condition to be tried in any action, except where an account can be taken, therefore the parties must resort to an action of account, or a bill in equity, where the same can be adjusted.

But here are no partnership dealings to be adjusted; all these parties were mere joint debtors to Kennedy, and if one paid the whole, or more than his share, he could immediately bring

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assumpsit against the others for contribution. It does not appear that the parties were under any other liabilities, or had made any other expenditures in this matter to be adjusted between them. The declaration alleges the debt to Kennedy to be a fixed and certain sum, so that nothing appears that any necessity existed for any adjustment of accounts to ascertain the share of the defendants, beyond a mere division of this single sum. We are of opinion, therefore, that the case does not fall within the principle of the cases cited by the defendants.

Judgment that there is no error in the record complained of, and the judgment below is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS,
AT THE
AUGUST TERM, 1859.

PRESENT:
HON. ISAAC F. REDFIELD, CHIEF JUDGE,
HON. ASA O. ALDIS, } ASSISTANT JUDGES.
HON. JAMES BARRETT, }

In re JESSE COOPER.*

*Habeas corpus. Exceptions. Contempt of court. Justices of the
peace.*

Issues and questions of law arising upon the trial of a writ of *habeas corpus*
before the county court, may be passed to the supreme court upon exceptions.

* This cause was decided at the General Term at Woodstock, in November,
1858, but the papers were not furnished to the Reporter in season to be printed
with the other cases of that term.

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A court, which has power to punish for contempt, is the exclusive judge whether misbehavior in court amounts to contempt or not; and the exercise of such power in such cases cannot be revised by any other tribunal.*

Justices of the peace while holding courts have power to punish for contempt.

HABEAS CORPUS brought before the county court at the December Term, 1857, and directed to Silas G. Bean, sheriff of Orleans county. The relator stated in his petition that on the 10th of June, 1857, at the trial of one Bergin for petit larceny, before Thomas Guild, Esq., a justice of the peace for Orleans county, the complainant was acting as counsel for Bergin; that some preliminary question was raised and discussed by the counsel, and decided by Justice Guild, who, after deciding the question, remarked to the complainant that "it might be convenient enough for Mr. Cooper to have the supreme court sit here all the time;" that the complainant replied, "I don't think that is necessary, for I think this magistrate wiser than the supreme court;" that the justice instantly replied, "you are fined ten dollars for contempt;" that on the 27th of October, 1857, the complainant was arrested and was still imprisoned by Bean, by virtue of a *mittimus* issued by Justice Guild, reciting that at a justice court held by him at Irasburgh, on the 10th of June, 1857, the complainant was by said court adjudged guilty of a contempt of said court, and of the authority thereof, in an open public session of the same, and was by said court ordered therefor to pay to the treasurer of the town of Irasburgh a fine of ten dollars, and to stand committed to jail until such order should be complied with. The *mittimus* directed the officer upon the neglect or refusal of the complainant to pay such fine, to commit him to jail until he should pay the same with the costs of commitment, or be otherwise discharged according to law.

The sheriff's return to the writ of *habeas corpus* set forth this *mittimus* with his return thereon, showing the arrest and commitment of the relator by virtue thereof, on the 27th of October, 1857, and stated that directly after such commitment the relator

* NOTE. Except by the supreme court upon *habeas corpus*, when it is made to appear that the contempt was committed through ignorance, mistake or misapprehension, or by acting in good faith under the advice of counsel, and that relief may be granted without impairing the right of any parties concerned. See Acts of 1855, No. 7, p. 11.—REPORTER.

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was suffered by the sheriff to go at large, the sheriff, however, regarding him as in custody under said process.

The relator demurred to this return, but the county court, at the June Term, 1858,—POLAND, J., presiding,—decided that the relator was not unlawfully restrained of his liberty, and that he be remanded to the custody of the sheriff, to which decision the relator excepted.

The relator, *pro se*.

Peck & Colby, for the people.

ALDIS, J. The relator brought his writ of *habeas corpus* before the Orleans county court, at their December Term, 1857. The case was heard upon demurrer to the return of the sheriff and the accompanying papers. The court decided that the relator was not unlawfully imprisoned. To this decision he excepted, and the case passed to the supreme court.

I. It is objected that a bill of exceptions is not properly allowable in such a case; that the proceedings of the county court upon *habeas corpus* are not to be revised in the supreme court.

Where, as in this case, the petition is brought and the case heard in the county court, and not by a single judge, we think the proceedings fall within the very terms of the statute. The words of the statute are very comprehensive. They are, “all issues of law determined by the county court,” etc., chap. 28, sec. 43, Comp. Stat.; and, “exceptions to the opinion of the county court on any question of law,” etc., may pass to the supreme court; chap. 28, sec. 44. As this was the trial of an issue of law by the county court, it clearly comes within the words of the act. It comes within the spirit of the law. Very important questions, affecting the liberties of the citizens of the State, arise upon the trial of petitions in *habeas corpus*. In matters of such moment the law should be settled and uniform. Without revision by the supreme court the decisions of the different tribunals in which such questions are heard will become conflicting, and the important rights involved will be left in uncertainty. Justice to the person imprisoned requires, that he should have the oppor-

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tunity of having the decision of the county court revised, when the decision remands him to jail, and the question involved is one merely of law.

II. It is alleged by the petitioner that the language used by him to the magistrate is not and cannot be a contempt, and therefore that the proceedings to punish for contempt have no basis to rest upon. The contempt here punished, if a contempt at all, comes under the head of misbehavior in court, of personal insult to the magistrate. In determining whether the language used was or was not a contempt, regard must be had, not merely to the very words used, but to the surrounding circumstances; the connection in which they were used, the tone, the look, the manner, the emphasis. These give meaning to the words, and might satisfy every bystander that they were used in an ironical and insulting sense. Of such contempts the court to whom they are offered, or in whose presence they arise, must be the exclusive judge, as the punishment for them should be immediate and on the spot.

If the magistrate has the power to punish for contempt, and has jurisdiction of the subject matter and the parties, his exercise of the power within his jurisdiction upon alleged acts of misbehavior in court, cannot be properly revised by any other tribunal. This has been so held in all cases where the power has been legally exercised by superior courts. If the exercise of the power by the county courts, or by a single judge or chancellor, is not to be revised by the supreme court, we see no reason why the action of a justice of the peace should be subject to revision, so long as he acts within his jurisdiction, and his proceedings are legal, and the punishment inflicted does not exceed his jurisdiction. The decision in *Vilas & Platt v. Burton*, 27 Vt. 60, is directly in point to show that the action of a chancellor is not so revisable.

It is urged that the power may be abused, and therefore that its exercise should be revisable. The same argument would apply to every court whose proceedings can be brought before a higher one. If the use of this power should become oppressive, the legislature would doubtless interpose to restrain it. In other States and in congress, statutes have been passed to modify and

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regulate the use of it. In this State there has been no tendency to the abuse of the power; on the contrary, this is believed to be almost the first instance of its exercise by a magistrate. Jealous as the people of this State are of any the slightest encroachment upon personal liberty, there is little danger that courts or magistrates will use the power in a tyrannical manner, or to gratify malicious or vindictive feelings.

II'. The relator insists that justices of the peace have no power to punish for contempt. This position is untenable.

The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business. It represses disorder, violence and excitement, and preserves the gravity, tranquility, decorum and courtesy that are necessary to the impartial investigation of controversies. It secures respect for the law by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity; it is due to the authority of law and the administration of justice.

In England this power is not confined to the superior courts. It is exercised by the courts of quarter sessions, a tribunal composed of two justices of the peace, and charged with the trial of inferior offences; *Rex v. Clement*, 4 B. & Ald. 229. So the court leet, a tribunal of still inferior jurisdiction, had the same power; 8 Coke 38 b.

The power is generally regarded, both in England and in this country, as incident to all courts of record; 11 Coke 44, a.; 7 Cranch 32; 4 Bla. Comm. 26.

It is said even that courts not of record and having no general power to fine and imprison, may punish, *instantly*, acts of misbehavior done in the presence of the court; *Hollingsworth v. Duane*, Wallace 77.

In Vermont, justices' courts are courts of record. Their jurisdiction is important and extensive, and in many matters is final and exclusive. They have the power to fine and imprison.

The power to punish for contempt is indispensable to the proper discharge of their duties by magistrates. Without it the magis-

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trate would be in a pitiable condition, compelled to hold court, to investigate controversies, examine witnesses and listen to arguments, and yet powerless to secure order in his proceedings, to enforce obedience to his decisions, to repress turbulence, or even to protect himself from insult. The mere power to remove disorderly persons from his court room would be wholly inadequate to secure, either the proper transaction and dispatch of business, or the respect and obedience due to the court and necessary for the administration of justice.

There is nothing in the character of our justice courts to justify apprehension of danger and tyranny from the abuse of the power; on the contrary, its occasional use might be found salutary in checking disorders that sometimes prevail in them.

Against any tyrannical or malicious exercise of this power we have ample safeguards in the attachment of our people to personal rights and liberty, in the publicity that attends the proceedings of magistrates, and in the vigilance and independence of counsel to resist encroachments upon their own rights or those of their clients.

Petition dismissed, and the relator remanded to the custody of the sheriff.

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Contempt of court. Habeas corpus. Supreme court.

A misapprehension as to the power of a justice of the peace to punish for contempt of court, on the part of one guilty of such an offence, does not furnish sufficient ground for his relief from punishment for such contempt by the supreme court under the provisions of the act of 1855, No. 7, p. 11.*

One is guilty of a contempt who, in the presence of a court, assails its decisions with sneers, sarcasm or irony.

A writ of *habeas corpus* cannot be issued by the clerk of the county or supreme court during vacation; and when issued in vacation it must be returnable forthwith, and not to a future term of court.

* See post p. 262.

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HABEAS CORPUS. The petition of the relator was as follows: "*To the Hon. the supreme court next to be holden at Irasburgh, in and for the county of Orleans, on the first Thursday next after the third Tuesday in August, 1859.*"

Your relator, Jesse Cooper, of Irasburgh, in the county of Orleans, would represent that he is now a prisoner in the common jail in Irasburgh, in the county of Orleans, in consequence of a contempt of court alleged and charged to have been committed in a justice court holden by and before Thomas Guild, Esq., a justice of the peace in and for the county of Orleans, at Irasburgh aforesaid, on the 10th day of June, 1857.

Your relator would further state that on the 10th day of June, 1857, James Bergen was on trial before said Thomas Guild, a justice of the peace as aforesaid, and a question was raised by your relator and discussed by the counsel, and after hearing and deliberation the said Justice Guild decided the question. He turned to your orator and remarked: "It might be convenient enough for you, Mr. Cooper, to have the supreme court sit here all the time." To which remark your relator replied: "I don't think that is necessary, for I think this magistrate wiser than the supreme court." To which remark of your relator, the said Thomas Guild instantly replied: "You are fined ten dollars for a contempt of court." No record of any contempt was made by said Justice Guild at the time, nor was anything done other than above stated. There were no charges preferred against your relator, nor was any opportunity allowed him to purge himself of contempt, nor to give any explanation in the matter. Your relator did not intend any contempt of the said Justice Guild, or his court, or his authority, or any of his decisions, or judgments, or his dignity.

At the time the said Guild made the remark to your relator, as above stated, it did not occur to your relator that the object of the said Guild was to irritate and provoke your relator to some act or declaration upon which he could seize as a pretext for imposing a fine upon your relator for contempt, or committing your relator to jail. But your relator then supposed that the said Guild intended said remark as a personal taunt and insult to your relator, and the only object of your relator's reply was

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to repel the insult and cast it back upon its author, where he supposed it belonged. It was not the authority of the said justice court, its decisions, judgments or judicial dignity that your relator intended to speak against, and the said contempt was committed by the relator by reason of his ignorance that his reply would be a contempt of any court, unless it should be the supreme court of this State, which contempt the said Thomas Guild could not by law punish; and your relator further saith that he was mistaken, and acted under a misapprehension and mistake in what he said and did, as he is now fully satisfied that the said Thomas Guild in making the aforesaid remark to your relator, acted with a view to aggravate your relator to some act or reply that could be used by him, the said Guild, to gratify his unfounded personal spleen against your relator, in fining and imprisoning your relator for a contempt of his, the said Guild's justice court.

Your relator further saith that there was not for many months, even after your relator was committed to jail, as hereinafter stated, any record made by the said Thomas Guild, justice of the peace, of your relator's condemnation and conviction, and fine for a contempt, nor any memorandum thereof, except a short minute on the complaint and warrant against the said James Bergen, in the hand writing of John H. Prentiss, Esq., in substance that your relator was fined ten dollars for a contempt of court, without any statement of what the contempt consisted of, whether acts, words or declarations, or when, or upon what occasion the same was committed.

Your relator would further state that after the said Justice Guild had announced that your relator was fined ten dollars for contempt of court, the said justice proceeded to try the said James Bergen, and nothing further was said or done to your relator about said contempt until the 27th of October, 1857, when your relator was, by Silas G. Bean, sheriff of Orleans county, arrested and committed to jail for the non-payment of the said fine, and the said Bean, as jailor in and for the county of Orleans, still has the custody of your relator, and restrains him of his liberty, and your relator is now imprisoned and confined in consequence of the contempt of said court and the non-payment of said fine.

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Your relator would farther state that he acted under a misapprehension and mistake in supposing that when a justice of the peace had rendered a judgment for a fine, and issued a mittimus, and caused the respondent to be committed to jail for non-payment of the fine, that his duties as a justice of the peace ended there. He having shut the party condemned up in jail, it was not for him to go farther; but in this case the said Thomas Guild has not only made it his business to cause the relator to be committed to jail, but has endeavored to intimidate the jailor by threats and menaces of suits and prosecutions, because the jailor in his humanity suffered the relator to come out of the dungeon into open day and fresh air, and even in the kindness of his heart allowed your relator to attend to some little business matters. And your relator is now a prisoner in the common jail in Irasburgh, in the care and custody of the said Silas G. Bean, keeper of said jail, by virtue of a mittimus for the non-payment of said fine of ten dollars, a true copy of which mittimus and the officer's return thereon is hereunto attached. Wherefore the said Jesse Cooper prays that without impairing the rights of any parties concerned, he may in the exercise of the discretion of this court be discharged from said imprisonment and go at large whither he will, without putting the jailor in fear from the threats of any of his accusers who would further persecute him, and that your relator be allowed to file with the clerk of this court, a bond in such sum as the court shall order, with a suitable and proper condition, that the relator will never again state that he thinks the said Thomas Guild wiser than the supreme court.

Dated at Irasburgh Jail, this 2d day of March, 1859.

JESSE COOPER."

The return of the sheriff Bean was substantially the same as that made by him in the case of *Ex parte Cooper*, reported *ante* p. 253, showing that he held the relator in custody under a mittimus issued by Justice Guild for the collection of the fine imposed by him upon the relator for contempt, as above mentioned. Certain affidavits were also taken in the case disclosing, however, no material additional facts to those set forth in the petition.

The relator, *pro se*.

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REDFIELD, Ch. J. This is an application to be relieved from imprisonment for contempt of a justice court, under the statute of 1855. That statute, sec. 2, provides that if it shall be made to appear that the disobedience or contempt (for which the person is imprisoned) "was committed through ignorance, mistake, or misapprehension, or by acting in good faith under the advice of counsel, and that relief may be granted without impairing the rights of any parties concerned, or the due administration of the law," this court may relieve the party upon such terms as they shall deem proper.

It is obvious that in a case of this kind no rights of other parties are concerned. For although the justice, as a friend to good order and from personal pride and self respect, may doubtless have some feeling in the matter, and naturally enough desire that his judgment should not, through the connivance of others, be itself treated with disrespect and contempt, and thus brought into ridicule, and although he may urge the officers of the law to the fair and just performance of their duty in the matter, which seems to be one of the relator's grounds of complaint against the justice, still, we cannot regard the justice as any party interested in the enforcement of his judgment, any farther than he may fairly feel an interest that the due administration of the law shall not be impaired; and we ought, perhaps, also to say, that it does not seem to us, from the account given by the relator of the conduct of the justice since the commitment, that there is any just ground of complaint against him in that respect.

In regard to our interference in this case being consistent with the due administration of the law, much must depend upon circumstances which might be shown in proof if the court should send the case to a commissioner to report the facts.

If this were a case where the amount of the fine was enormous and altogether beyond the relator's means to pay, which might be the case in a court of unlimited jurisdiction in the matter of fines, and if in such a case the relator had suffered a rigorous confinement within the wards of the inner prison, as the law would seem to require in such cases, the same as in any other case of commitment for non-payment of a fine, so that the punishment had already become such as fairly to answer the just

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demands of the law, and to produce upon the relator the proper ends of punishment, in submission and penitence, there could be no good ground to fear that the interference of this court in the matter would, in any sense, "impair the due administration of the law."

But in relation to the merits of the case, we are unable to regard it as coming fairly within the general provisions of the statute. The statute applies only to cases where the contempt was committed through "ignorance, mistake, misapprehension, or in good faith under the advice of counsel." The only thing in the present case which could fairly be regarded as coming within either of these terms, is the misapprehension of the relator in regard to the power of justice courts to punish for contempt. We have no doubt of a misapprehension in the mind of the relator to this extent. And until the question was determined by this court, (and as I think upon very sufficient grounds,) there was a difference of opinion among the profession to some extent in regard to that question. But that is now no longer an open question before this court. And the relator is again called upon to exercise his forbearance in regard to decisions which he did not regard as law until made. We cannot regard a mere misapprehension of the law as any ground for the interference of this court under the statute. We have no occasion to review the proceedings of the justice, having once decided their legality and regularity. All beyond that belongs exclusively to the court where the contempt was committed.

Perhaps it is just to all concerned to say that the relator, upon his own showing, must have used the words adjudged a contempt in an ironical sense, and intended thus to convert them, by a sarcasm, into a weapon of offence. This is entirely allowable towards those standing in relations of equality, where no obedience or submission is due. But in those relations where the law, for any cause, requires submission and obedience, the case is different. In the relations of parent and child, or teacher and pupil, or the court and its bar, the decisions of the superior, for the time being, are final and are to be respected, whether wise or foolish, in fact. And they cannot be encountered with sneers and sarcasm, however just and appropriate the weapon may seem

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to those who use it, or to others. The counsel must submit in a justice court as well as in this court, and with the same formal respect, however difficult it may be either there or here.

We ought to say, probably, that we see no evidence of anything wrong on the part of the justice, certainly not amounting to intentional provocation, with any view to draw the relator into a contempt of his court, and thus seek occasion against him. It is likely enough the relator now believes that, but upon very inadequate proof, as we think.

We do not see that the relator has any alternative left him but submission to what he no doubt regards as a misapprehension of the law, both on the part of the justice and of this court. And in that respect he is in a condition very similar to many who have failed to convince others of the soundness of their own views, or to become convinced themselves of their fallacy. Even though vanquished by mere authority, he can argue and is of the same opinion still. His argument in this case seems to breathe a spirit of respect for, and submission to, the decisions of the constituted tribunals of the State. It only remains to be known whether his conduct will be made to conform to that spirit, of which, from a long personal acquaintance, I am happy to say I have not the slightest doubt. It is, perhaps, to be regretted that any such collision should have occurred between counsel and any court. There does not seem in the case to have been much malice on the part of the counsel, and so far as we can see no fault with the justice, or if any, it consisted in an unwillingness to submit to intentional insult from any quarter, or to any extent, while acting in a judicial capacity. He will probably find it difficult always to secure that immunity. It is his right to make the attempt, and he is not to be censured for doing so. At all events there is ground for difference of opinion, whether, in this country with our free notions in regard to speech, perfect judicial respect can be practically better secured by strict enforcement of legal penalties, than by forbearance and endurance, within certain reasonable limits.

And in regard to the relator, his case, no doubt, seems severe to him, chiefly in consequence of the loose habits of forensic etiquette which almost universally prevail in justice courts, and

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because he has before known far greater indignities to pass unpunished. But those of us who profess to live by the law must be content to die by it, or to submit to its penalties, and to console ourselves by the reflection that it is no legal ground of exception to punishment because others go unpunished for more flagrant offences.

II. Lest this case might be drawn in precedent, we ought to say that it seems to be an anomaly in practice for the clerk to issue a writ of *habeas corpus* in vacation, which might be returnable one year from date. The statute is explicit that the writ shall issue from the court "during its sitting, or by any judge thereof during vacation." Sec. 3 provides that the writ "shall in all cases be made returnable forthwith." Sec. 6. provides that if the court shall adjourn before the writ is returned, it shall be returned before any of the judges. Sec. 15 provides that the case shall be heard "without delay." It is obvious it could never have been contemplated that the writ should be issued by the clerk in vacation, returnable in term. And the expression in this statute that the party shall be entitled to his writ returnable to the supreme court, is not intended to alter the course of procedure, we apprehend.

Respondent remanded to former custody, and petition dismissed.

ELISHA WHITE v. NATHANIEL HILDRETH and *Trustee*, JOHN L. HILDRETH.

Husband and Wife. Attachment.

Since the passage of the Married Woman's Act of 1847, Comp. Stat. p. 403, sec. 15, a husband has not, during his wife's life, an interest subject to attachment by his creditors, in the betterments made by him upon her land, by way of cultivation, or buildings in the ordinary course of occupancy, husbandry and improvement, or in the rent of such lands when leased under such improvements to a third party.

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TRUSTEE PROCESS. The facts in the case are sufficiently set forth in the opinion of the court.

The county court, at the December Term, 1858,—**BENNETT, J.**, presiding,—adjudged the trustee liable, to which the trustee excepted.

Edwards & Stewart, for the trustee.

J. E. Dickerman, for the plaintiff.

BARRETT, J. The father of the defendant's wife conveyed to her in 1844, a lot of land containing one hundred and eighteen acres, which was then worth two dollars per acre. Soon after this the defendant, with his wife and a family of small children, moved on to said land, and commenced clearing it up and erecting buildings thereon. He and his family have resided there ever since. He has improved the premises in the ordinary course, so that now they have become a farm worth twelve hundred dollars. In May, 1847, the trustee, who is a son of the defendant, rented said farm of his mother and stipulated to pay the rent to her. The defendant joined with his wife in executing the lease. That rent is sought to be reached by this process, on a debt owing by the defendant to the plaintiff.

The case does not show when the debt accrued, but we assume that it accrued so recently as not to come within the exception in the statute exempting the rents, issues and profits of the wife's real estate, and the husband's interest therein, from being taken and held on his debts.

In this case the *rent*, in its strictly technical and proper sense, is sought to be reached.

The question is, whether it is so the rent of *real estate belonging to the wife*, as to be shielded by the exemption provided by the statute referred to.

The wife owns the fee of the land. In contemplation of law, the improvements become incorporated in, and the permanent buildings accrue to, and become an integral portion of the realty. Those improvements and buildings have been made by the husband. They are the *betterments*, so to speak, that he has made

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upon the land. Obviously, as is claimed in the argument, were it not for those betterments the land would have commanded but a small part of such a rent as one hundred and twenty-five dollars, if any rent at all. It is also clear that if the *defendant* had not, and somebody else had, made those betterments, there would be no ground for claiming that the rent could be reached and held upon the defendant's debts. The question resulting from this analysis is, whether the husband, during coverture, holds such a *legal* interest in the *betterments* that he makes upon his wife's land, by way of cultivation and buildings, in the ordinary course of occupancy, husbandry and improvement, as can, by process of law, be reached by his creditors?

It is not claimed that a mere *equitable* interest in the husband, that might accrue from such a state of facts, could be established and reached by this form of proceeding. Hence it is needless, and so we forbear to inquire whether an *equitable* interest accrues to the husband in virtue of his relation to, and his work and expenditures upon the land of his wife,

Upon a first glance, it would seem as if the fruits of the defendant's labor and expenditures, such as are accruing in this instance, should in some way be made available towards the payment of his just debts. But upon a most careful consideration we are unable to determine that it can be done in this form of proceeding. The legal title to the land, with the supervening improvements and buildings is still in the wife. It accrued to her during coverture. The rent reserved in the lease to her son is the rent of the land that she owns. The statute expressly exempts such rent from the hands of her husband's creditors.

This provision of the statute seems to answer what otherwise might have been a plausible if not a well founded suggestion, viz : that though this money is made payable to the wife of the defendant, still it is but the rent of the freehold which the husband holds by virtue of the coverture and the birth of issue capable of inheriting, and is, in contemplation of law entirely the husband's without involving the wife, even as the meritorious cause. If upon any principle of the common law or under any provision of the statute, we could distinguish and separate the betterments made by the husband, from the land itself, we might perhaps

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devise some theory and mode of severance and apportionment by which, while the reasonable proportionate rent for the land in its original value should be left to the wife, the residue of the rent reserved should be held by the creditor of the husband. But the common law is barren of any such principle, and the statute is equally destitute of any such provision.

On the whole, we are compelled to regard the judgment of the county court as not well grounded. It is, therefore reversed, and judgment is rendered in this court that the trustee be discharged with costs.

SAMUEL B. RIDER v. KELLEY & ROBERTS.

Contract. Damages. Sale.

In the case of a contract to deliver at a future day, at a specified price and place, property not *in esse* when the contract is made, but to be produced by the cultivation of the earth, and to be of a specified character and description, the property does not pass to the vendee by its mere delivery at the appointed time and place, and its tender to him, if he refuse to accept it.

In such cases the rule of damages for the breach of the contract by the vendee in refusing to receive the property, is the difference between the contract price and its market value at the time of delivery.

COVENANT. The plaintiff declared upon the following agreement:

“ARTICLES OF AGREEMENT

indented, made and agreed upon this 17th day of July, in the year of our Lord one thousand eight hundred and fifty-six, between Kelley & Roberts, of Derby, in the county of Orleans and State of Vermont, on the one part, and S. B. Rider, of Newport, in the county of Orleans and State of Vermont, Yeoman, on the other part as follows, viz:—The said S. B. Rider, in consideration of the covenants and agreements hereafter mentioned, to be performed on the part of the said Kelly & Roberts, does on

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his part agree to deliver or cause to be delivered at Derby to the said Kelly & Roberts for the term of four years, all the hops he raises on from one to two thousand hills. If the said Rider shall cultivate more hills than is mentioned in this contract, the said Kelly & Roberts shall be entitled to their proportion of the hops grown on the whole number of hills, according to the number of hills the said Kelly & Roberts has contracted to receive. Said number of hills are to be cultivated in a good, husbandlike manner yearly during the term of four years, and to be delivered on or before the 10th day of October in each year; the first time of the delivery of said hops to be in October next; and the said Kelly & Roberts doth on their part agree to receive the said hops produced from the said number of hills, at Derby yearly for the term of four years as aforesaid, and to pay twelve and one-half cents per pound for first sort, and ten and one-half cents per pound for second sort, cash on delivery for each and every pound so delivered; said hops to be packed in good fine bagging, to be of the years growth in which they are delivered. And it is further agreed by the parties to these presents that in case the said Rider shall fail to deliver all or any part of the aforesaid quantity of hops at the time aforesaid, it shall be lawful for the said Kelley & Roberts to supply the deficiency by purchase elsewhere and to charge the said Rider with whatever sum he shall be obliged to pay therefor beyond that at which the said hops would have been furnished as aforesaid by the said Rider; said hops are to be Vermont inspection.

In witness whereof, we, the parties to these presents, have interchangeably set our hands and seals the day aforesaid.

KELLY & ROBERTS, L. S.

S. B. RIDER, L. S."

The plaintiff averred in his declaration that in 1857 he raised hops on seventeen hundred and eighty hills, that they were cultivated and packed as provided for in said agreement, that on the 8th of October, 1857, he offered to deliver and tendered said hops to the defendants at their store in Derby, and that they were still ready to be delivered to them in pursuance of such agreement, but that the defendants would not receive them nor pay for them according to their agreement.

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The defendants pleaded *non est factum*, and that they had performed their covenants, and the case was tried by jury at the December Term, 1858,—BENNETT, J., presiding.

It appeared in evidence that at the time this contract was made, the plaintiff resided in Newport and had a hop yard there, from which he raised about four hundred pounds of hops in the season of 1856, and delivered them to the defendants, and the defendants received and paid for them the price stipulated in the contract.

In the spring of 1857 the plaintiff removed to Coventry and but partially cultivated his hop yard in Newport, the hops having been mostly winter killed. The plaintiff had upon his farm in Coventry a hop yard of about three hundred hills. In June, 1857, the plaintiff purchased the use of three hop yards of individuals residing in Coventry, viz: of Messrs. Niles, Hoyt and Herren. Niles' hop yard contained about four hundred hills, Herren's about four hundred, and Hoyt's three hundred hills. The plaintiff paid Herren and Niles six cents per pound, and Hoyt eight cents for the hops grown on their yards that season, and was to complete the cultivation of them himself, besides paying them the expenses incurred in cultivating their yards up to the time he purchased them. At the time of this purchase the poles had all been set by the former owners, and the hop vines were partly up the poles. The vines had been tied up, and the yards had been cultivated by plowing between the hills, and part of the hills had been hoed. After the purchase the plaintiff cultivated these yards the rest of the season, picked and dried the hops and put them in good fine bagging. The hops obtained from those three yards weighed nineteen hundred and fifty-three pounds, were of good quality, and were duly inspected by Vermont inspection.

The plaintiff raised upon his own farm five hundred and ninety-nine pounds of hops, four hundred and thirty pounds of which were put in two bales, and the residue were mixed in bales with those raised on the three yards above mentioned.

The plaintiff carried all of these hops to the defendants' store in Derby, and offered to deliver them on the contract by the 10th day of October, 1857. The defendants refused to receive those grown on the Niles, Herren and Hoyt yards, insisting that they

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were not bound to take them by the terms of the contract, but were willing to receive and pay for all that the plaintiff raised upon his own farm, according to the terms of the contract, and did receive the two bales, weighing four hundred and thirty pounds, and paid the plaintiff for them, and were willing to receive the residue grown upon the plaintiff's farm if the plaintiff would separate them from those grown on the three other yards. But the plaintiff insisted that the defendants were bound to take all the hops and made no separation. The hops not received by the defendants weighed twenty-one hundred and twenty-two pounds, and were taken by the plaintiff to a neighboring storehouse in the vicinity of the defendant's store, in Derby, and there placed in safe keeping for the defendants. The plaintiff notified the defendants where the hops were, and that they were thus deposited for them.

Upon these facts the county court decided that the plaintiff was entitled to recover the contract price of the hops tendered by him to the defendants, with interest, to which the defendants excepted.

Edwards & Stewart, for the defendants.

1. The plaintiff cannot recover because he has not performed his portion of the agreement.

2. The court should have instructed that the rule of damages in case the plaintiff was entitled to recover, was the difference between the contract price of the hops tendered and their market value at the time of the tender. *Dana et al. v. Fielder*, 2 Kernan 40; 3 Bacon's Ab. Tit. Damages, pp. 56-62; *Gainsford v. Carroll*, 2 B. & C. 624; *Boorman v. Nash*, 9 B. & C. 145; *Thompson v. Alger*, 12 Met. 443.

Cooper & Bartlett, for the plaintiff, cited as to the rule of damages, Chipman on Cont. 64, 87, 88; *Curtis v. Greenbanks*, 24 Vt. 586; *Blish v. Granger*, 6 Vt. 340; *Carpenter v. Dole*, 13 Vt. 578; Chitty on Cont. 3d Ed. p. 124 and notes.

ALDIS, J. The plaintiff states in his declaration that "he offered to deliver and tendered to the defendants" the hops contracted for, but that "the defendants did not nor would receive

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said hops, nor pay for them, but on the contrary neglected and refused and still neglect and refuse to receive or pay for the same." The case states that the defendants refused to receive the hops at their store (the place of delivery,) and they were taken by the plaintiff to a storehouse in the neighborhood of the defendant's store, and there left for the defendants, and the defendants were notified that the hops were so left for them. The court decided that the rule of damages was the contract price which the defendants were to pay for the hops. This rule of damages must stand upon the principle that the vendor in this case, by offering to deliver and tendering to the defendants the hops contracted to be delivered, thereby passed the title to the vendees, so that the hops so tendered became the property of the vendees, and the vendor's title to them ceased, although the vendees refused to accept and did not accept of them.

It is to be observed that this is not the case of the sale of the specific article and the tender of it to the vendee; nor is it even the sale of goods generally and the agreement to deliver and the delivery of them by a day certain; nor is it the sale and delivery by the vendor and acceptance actual or constructive by the vendee of a portion of the property delivered. The authorities cited by the plaintiff will be found to range under some one of these heads.

But it is a contract to deliver at a future day property not then *in esse*; property which is to be thereafter produced by the cultivation of the earth, and which is to be of a specified character and description. It comes by analogy within the class of contracts for the manufacture of goods and for their delivery at a future day. In such cases the authorities have abundantly established the general rule that the article must not only be made and offered to the vendee, but that he must accept of it, or it must be set apart for him by his consent, before the title to it will vest in him. And although the cases to some extent modify this general rule, as where the parties agree to treat the article as constructively delivered when finished, or as where the vendee finds the materials and superintends or specially directs in the process of manufacture, yet we find nothing to make this case an exception. It is obvious that the parties did not intend and could not have

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intended that a mere tender of the hops by the vendor should pass the title in them to the vendee against his positive refusal to accept them. The hops were to be raised thereafter, were to answer the special description specified in the contract, and were to be of Vermont inspection. The vendee was entitled to examine them and use his judgment in determining whether they came within the contract. They would not become his property against his consent; although if he wrongfully refused to accept them he would be liable in damages. He was not bound by the offer of delivery to accept them and treat them as his own. Where the contract so plainly points for something further to be done by the purchaser, some further right or privilege to be exercised by him before actual delivery takes place, and actual possession and title change, there the possession and title must be held to remain in the seller, and he must take charge of the property and keep or sell the same as he sees fit. *Hale v. Huntley et al.* 21 Vt. 147; *Jones v. Marsh*, 22 Vt. 144; *Gilman v. Hill*, 36 N. H. 311; 26 Barb. 472.

Granting, therefore, that the defendants, by refusing to receive the hops have broken their contract, we think they are justly liable in damages only for the difference between the contract price and the market price at the time of delivery. Such is the rule in actions brought by the vendor against the vendee for non-delivery. It stands upon this reasonable ground, that as the title to the property remains in the seller, he can, upon non-acceptance by the vendee, sell the property at once for its market price, and therefore that the difference between such market price and the contract price will indemnify him against loss. *Crooks v. Moore*, 1 Sandf. 297.

As the case must be sent back for trial on account of the error in the assessment of damages, and as we are not able to fully concur upon the other point, as to whether the defendants were bound to receive the hops they refused to accept, we reverse the judgment without passing on that question.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF LAMOILLE,
AT THE
AUGUST TERM, 1859.

PRESENT:

HON. MILO L. BENNETT, }
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. JAMES BARRETT, }

ROBERT HERRIN v. THE FRANKLIN COUNTY BANK.

Action. Case.

In consequence of erroneous information given by an officer of a bank to the plaintiff in regard to the amount of money which had been there deposited to his credit by a third person, the plaintiff incurred certain expenses. This erroneous information was however given in good faith; *Held*, that it was a case of *damnum absque injuria*, and that the plaintiff could not recover of the bank the amount of such expenses.

Herrin v. The Franklin County Bank.

CASE. Plea, the general issue, and trial by jury, at the December Term, 1858,—ALDIS, J., presiding.

The plaintiff being indebted to the defendants upon a note for one thousand dollars, procured a discount at the Caledonia County Bank in Danville, and requested the cashier of the latter bank to send the proceeds, amounting to four hundred and eighty-four dollars and seventy-five cents, by express to St. Albans, where the defendants' banking house was located. At the same time, the plaintiff, who resided in Waterville, wrote to one Armington, his agent in St. Albans, sending him a written order on the express office in St. Albans for the money so sent, and requested him to take the money and have it applied upon the note held by the defendants. The Caledonia County Bank transmitted the money as requested by the plaintiff, but as it had not arrived at St. Albans when Armington presented the plaintiff's order at the express office, he left the order with one Barlow, the defendants' teller, and requested him to get the package of money from the express company and apply it on the plaintiff's note. The package of money from Danville arrived at St. Albans by express shortly afterwards, and the cashier of the defendants received it upon the order left by Armington, and indorsed its full amount, four hundred and eighty-four dollars and seventy-five cents, upon the plaintiff's note. By mistake, however, the entry of the money upon the defendants' books thus received was two hundred and eighty-four dollars and seventy-five cents.

A few days afterwards Armington called at the bank and inquired of the teller whether the package of money had been received from Danville, and how much it was. The teller after examining the books of the bank informed him that the amount thus received was two hundred and eighty-four dollars and seventy-five cents, whereupon Armington wrote to the plaintiff that that amount had been received and applied upon his note. It was not claimed by the plaintiff that the error in the entry upon the books, or in the information given by the teller to Armington, was intentional, nor that the defendants or their officers were guilty of any intent to defraud or injure the plaintiff. Upon receiving this information from Armington the plaintiff immediately went to Danville to ascertain why the full amount of

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the proceeds of the discount obtained there were not sent to St. Albans. At Danville he was assured by the officers of the bank that they had sent four hundred and eighty-four dollars and seventy-five cents by the stage driver to be carried by him to Montpelier, and thence to be sent by express to the plaintiff at St. Albans, whereupon the plaintiff, after returning to Waterville and consulting his attorney, started directly for Montpelier, via St. Albans, for the purpose of causing the stage driver to be arrested at the former place on the charge of stealing the money. At St. Albans, however, where the plaintiff on his way through called at the defendants' bank, the mistake was discovered upon an inspection of the plaintiff's note.

The plaintiff claimed to recover of the defendants his expenses and the value of his time during his journey to Danville and back, and to St. Albans, as above mentioned, the same having been occasioned solely by the mistaken information given by the defendants' teller to Armington, as above stated.

The defendants requested the court to charge the jury that the plaintiff could not recover, but the court declined so to do, to which the defendants excepted.

Under the charge of the court as given the jury returned a verdict for the plaintiff.

Hard & French, for the defendants.

The law does not afford relief for every species of loss that parties sustain by the acts or neglects of others. Damages resulting from *fraud*, *deceit* or *malice*, always furnish good cause of action. So where any *public duty*, or obligation imposed by private contract is omitted or not legally fulfilled, an action lies. But where the injury is not to be traced to any evil motive, and no right has been withheld or wrong inflicted arising out of a duty implied by law from public policy, or imposed by private contract, injury (except that to life, liberty, or property, *directly*,) is not entitled to redress. The law does not seek to interfere with or enforce the moral rights and duties of society. It is only *legal injury* that sets its machinery in motion, and hence the maxim that *damnum absque injuria* gives no cause of action.

In this case the only obligation on the part of the defendants

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was to receive and correctly apply upon the note all moneys paid to it for that purpose by the plaintiff. The defendants were not bound by public duty or private contract to answer inquiries or give information as to the money received, or whether it had been received at all. And not being bound to give information they are not responsible for that given, unless fraud or malice be shown; *Pasley v. Freeman*, 3 Term 51; *Haycraft v. Creasy*, 2 East 92; *Davis v. Jenkins*, 11 M. & W. 755; 2 Smith's Lead. Cases, 138 and notes; *Collins v. Ridgley*, 48 E. C. L. 819; *Rawlings v. Bell*, 50 E. C. L. 951.

Thomas Glead, for the plaintiff.

Where one party sustains an injury by the negligence or carelessness of another, the party injured may maintain an action on the case to recover compensation for such injury. No question can be made in this case that the plaintiff has sustained damage from the negligence of the defendants; 1 Smith's Leading Cases 311-14; *Sheldon v. Fairfax*, 21 Vt. 102; 2 Stephens N. P. 1006-8.

BENNETT, J. The object of this action is to recover damages which the plaintiff claims to have sustained by reason of the mistaken information given to him in regard to the amount of a certain sum of money which had been deposited with the bank for his use. This is not a case of *fraud* or *bad faith* in the teller of the bank, but of pure mistake, and the question is, can this mistake be made the ground of an action against the bank, even going upon the ground that the act of the teller is to be regarded as the act of the bank? The most that can be made of the case is, that it was the representation of a fact which turned out to be incorrect.

It may be true that the plaintiff acted on the information communicated to him by the teller, and may have been put to some trouble and expense by reason of the mistaken information which he received from the teller, but it is not *damage alone* that gives a right of action.

To make a representation which works an injury or damage, *actionable*, there must be a *fraud*, or the representation must

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amount to a warranty, express or implied. The case itself negates all fraud, and it is not a case of implied warranty. Though it may be expected of banks and of men of business, that their books will show the true amounts of money received by them, from time to time, yet it would be going too far to say that the law would raise an implied warranty against all mistakes. The true sum was indorsed upon the note, and the mistake in entering the sum on the books of the bank, was probably occasioned by the teller in writing the word *two*, when he intended to write *four*.

There being no implied warranty against mistakes, no action can be maintained against the bank upon any supposed negligence. The case in principle is like the case where a person gives mistaken information in regard to the pecuniary situation of a third person, by means of which such third person obtains a credit. In such a case, though the person inquired of is told the object of the inquiry, and that there is an intention to act upon the information received, still, no action will lie for the *misinformation* if given in good faith, although it turns out incorrect and occasions a damage to the party trusting to it. *A legal injury and a damage must both concur* to give an action, and we think this is not a case where the plaintiff can be said to have sustained a *legal injury*.

The result is that the judgment is reversed and cause remanded.

MARY R. BINGHAM v. MARVIN R. MARCY.

Practice. Bastardy. Supreme and county courts.

The 11th section of chap. xxxi. of the Comp. Stat., p. 243, authorizing the supreme or county court, in case of the loss of the writ and declaration in any action therein pending, to order a new declaration to be filed, does not apply to a prosecution for bastardy, where the original complaint, justice's record and warrant are lost.

COMPLAINT FOR BASTARDY. The complaint was entered in the county court at the May Term, 1857. At the May Term,

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1858, the plaintiff showed to the court that the original complaint before the justice of the peace, and his record of the proceedings before him thereon, and the original warrant issued by him, all of which had been returned by him to and filed in the county court, were lost, that the bond of recognizance entered into by the defendant and his surety in conformity with the warrant of the justice, which still remained in court, recited the proceedings before the justice in such a way that a correct copy in substance of the original complaint, warrant and record could be made, and the plaintiff thereupon moved for leave to file a complaint, warrant and record to be in substance a correct copy of the lost originals. The county court, at the December Term, 1858,—ALDIS, J.,—presiding, granted this motion, allowed the copy presented by the plaintiff to be filed, to which the defendant excepted.

The copy so filed contained evident errors of dates, which required correction, and which the court also allowed to be corrected on affidavit of the plaintiff's attorney, showing that they occurred in making the copies by the aid of the bond of recognizance, and his recollection as to the substance of the papers which were lost.

The court then proceeded to try the case upon its merits, on the copies so filed and corrected, and the jury returned a verdict of guilty against the defendant.

Gleed & Hendee and Dillingham & Durant, for the defendant.

Child & Benton, for the plaintiff.

PIERPOINT, J. This was a proceeding upon a complaint of bastardy. From the exceptions it appears that after the suit was entered in court, the original complaint, warrant and records of the proceedings before the magistrate, which were brought up and filed in the county court, were lost; no copies of them appear to have been in existence. The plaintiff applied to the county court for leave to file another complaint, warrant and record that should "be in substance a correct copy of the originals, which were lost." The court ordered such papers to be filed, whereupon the defendant filed a motion to dismiss the proceedings, which the court overruled, and the case proceeded to trial and judgment.

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It seems to be conceded by counsel, and we think correctly, that the county court had no authority to allow the filing of these new papers, as a substitute for the original, unless such authority is conferred by the statutes of this State. But it is insisted by the plaintiff that the 11th section of the 31st chapter of the Comp. Stat., relating to Process, gives the court such power. That section provides that when any writ and declaration are lost, etc., the court may order a declaration to be filed, and that such proceedings shall be had on such declaration, as though it was the original writ and declaration in such action. This presents the question whether the proceedings in a case like the one now before us come within the letter or spirit of the statute. Can either of the papers filed in this case, under the order of the court, be called a declaration or writ within the legitimate meaning of those terms, as used in common or legal parlance? We think not. We do not think that the legislature ever intended by the use of those terms to include therein the complaint and warrant in a bastardy case. They evidently only intended that this section should apply to that class of civil proceedings that are commenced in our courts by the issuing of a writ and declaration. And although suits of this kind have long been considered in this State as civil suits for many purposes, yet for other purposes, and particularly in respect to the form of the proceedings, they have been regarded as criminal proceedings. The mode of proceeding is wholly unlike that in a civil suit. The complaint is required to be made by the woman in writing and under oath, and this is made the basis of all future proceedings; the magistrate issues his warrant and brings the accused party before him, not for the purpose of a hearing or trial, but that he may be put under bonds for his appearance at the next term of the county court, to answer to such complaint, or to be committed to jail to await the time of trial. The statute requires such complaint to be returned by the magistrate to the county court, and it is upon such complaint thus verified by the oath of the complainant, that the defendant is put upon his trial. These proceedings are quite summary and have sometimes been regarded as somewhat arbitrary. We think that after the accused has been thus arrested and bound up for trial, he has the right to

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insist that he shall be tried upon the complaint as it was originally made, and not be put to trial upon another complaint not made according to the requirements of the statute, but as near like the original as the best recollection of the plaintiff or her counsel can make one. It is not claimed that the papers upon which the party was tried, were copies of the original papers. They were themselves original papers, intended to be made similar to the old ones. The original complaint, made to the magistrate, is a statement of the facts made by the party under oath. The defendant is entitled to the benefit of a comparison of her statement on the stand with the original statement.

Circumstances may have transpired between the time of making the complaint and the time of trial, that would make the statements and the complaint important testimony for the defendant. To allow the plaintiff to file a new complaint in the absence of the original one, might deprive the defendant of the benefit of this testimony, for the experience of this case shows that with the best possible intentions to make the last complaint like the first, when the case came to trial it was found that very serious errors had been committed and further alterations were required.

These considerations have no application to the filing of a new declaration in ordinary civil cases. There the plaintiff does not profess or attempt to make his new declaration a copy of or in its details at all like the original. If it is for the same cause of action it is sufficient, and the defendant can sustain no injury by the substitution. The legislature may well grant to the courts the power to allow the substitution in such cases when they would not in cases like the present.

The result is the judgment of the county court overruling the motion to dismiss the case is reversed, and judgment is entered that the suit be dismissed with costs.

Smith v. Pinney.

EMILY E. SMITH v. EDSON PINNEY.

Illegal consideration. Principal and agent.

If a woman authorize her agent to settle a civil prosecution in her behalf for bastardy, and such agent settle it by taking a note to his principal, the consideration of which is not only the settlement of the civil complaint, but also the execution of a written agreement on the part of the woman not to instigate, or testify in, any criminal prosecution against the defendant, such note is illegal and cannot be enforced, notwithstanding the agent exceeded his authority in making such agreement, and the woman signed the agreement without reading it, and supposing it to be merely a settlement of the civil suit. By accepting the note and putting it in suit, she is held in law to have ratified the acts of her agent.

ASSUMPSIT upon a joint and several promissory note for one hundred and seventy-five dollars, executed by one Pennock, the defendant and one Stewart, and payable to the plaintiff or bearer Plea, the general issue, and trial by jury, at the December Term, 1858,—ALDIS, J., presiding.

It appeared in evidence that the plaintiff commenced a complaint against Pennock for being the father of her bastard child, Pennock having been a married man when the child was begotten; that the note in question was executed in settlement of this complaint, but that the defendant refused to execute it until the plaintiff and her father, who acted as her agent in settling the bastardy complaint, would execute to Pennock a bond in the penal sum of five hundred dollars, conditioned that the obligors would in no way cause the bastardy complaint to be entered in the county court, or make any complaint in behalf of the State in connection with the begetting of such bastard child, and also that if the bastardy complaint, or any other complaint connected therewith, should be prosecuted against Pennock, the plaintiff would not testify against him in any court whatever. It further appeared that such a bond was executed and delivered to Pennock by the plaintiff and her father, and that in consideration thereof the defendant executed and delivered the note in question to the plaintiff.

The plaintiff then offered testimony tending to show that the bond was handed to the plaintiff by her father, or some one of her family; that she signed it without reading it; that she could

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have read it if she had wished ; but she did not read it, and supposed that the effect of the bond was only to relinquish and settle the complaint for bastardy, and nothing else ; that the defendant was not present when she signed it ; that the father of the plaintiff took the bond, and, as her agent, delivered it to the defendant in order to get the note ; that the father had no authority to negotiate as to anything else than the complaint for bastardy, but was authorized to deliver the bond and get the note. The evidence so offered was excluded by the court, and upon the foregoing facts the court directed the jury to sign a verdict for the defendant.

To the exclusion of the evidence offered, and to the decision of the court in directing a verdict for the defendant, the plaintiff excepted.

T. Gleed, for the plaintiff.

Child & Benton, for the defendant.

BARRETT, J. The plaintiff's counsel concedes that the provisions of the condition of the bond in question constitute such a compromise or compounding of a crime as to render void any contract that should be made upon the consideration of said bond. But it is urged that the evidence that was offered by the plaintiff and excluded by the court, tended to show a state of facts, which, as to the plaintiff, would countervail the *prima facie* effect of the provisions of said condition, and, therefore, that such evidence should have been admitted.

The plaintiff is seeking, by this suit, to enforce in her own favor a contract that, as to this defendant, was entered into by him only in consideration of the illegal provisions in said condition.

To avoid the effect of these provisions she seeks to prove that when she executed the bond she did not, in fact, know that said provisions were contained in it, and that she supposed the only effect of the bond was to settle and discharge the civil prosecution for bastardy.

The rejected evidence would have tended to show that the

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plaintiff's father, as her agent, was authorized by her, at first, only to negotiate and effect a compromise and adjustment of the civil prosecution.

It would also have equally tended to show, that in negotiating and effecting such compromise, and as a part thereof, he in fact negotiated and entered into the illegal provisions in the condition of the bond; and that after it was executed by the plaintiff he took the bond, and, as her agent, delivered it to the defendant in order to get the note, and was authorized by her thus to do.

By the fact of receiving the note and seeking to enforce it by this suit, the plaintiff, in contemplation of law, ratifies and adopts the acts of her father by virtue of which the note was procured, and makes him her agent for all that he did, as the effective means by which it was procured.

This clear result of an unquestionable principle of law renders it needless to discuss what might be the proper legal view to be taken of the fact that the plaintiff executed the bond without reading it, notwithstanding she had opportunity and might have read it if she had desired so to do, in connection with the further fact that no fraud was practiced upon her in this respect.

For one, I should hesitate to permit the plaintiff to avoid a fatal vice in the contract which constitutes her cause of action, by alleging voluntary ignorance of the terms of another contract to which she is an immediate party, and which constitutes the sole consideration for the contract she is seeking to enforce. I am not aware of any principle of law or morals that would justify it.

We think the county court made a proper disposition of the case, and the judgment is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX,
AT THE
AUGUST TERM, 1859.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. JAMES BARRETT, }

SAMUEL S. REED v. GEORGE D. CHANDLER.

Grand List. Taxes.

The grand list of a town does not become the legal basis of taxation until a majority of the listers have signed and sworn to a certificate thereon, as required by section 33 of No. 43 of the acts of 1855, (see acts of 1855, p. 55) and by section 2 of No. 47 of the acts of 1856. (See acts of 1856, p. 52.)*

* These two sections prescribe the form of the oath upon the respective grand lists to which they apply.

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REFLEVIN for two cows. The defendant filed an avowry setting forth that he took the cows in question as collector of school district No. 13 in Concord, by virtue of a warrant issued to him for the collection of a school tax laid by that district. The only question in the case, which the opinion of the court renders material to be reported, was in regard to the validity, as a basis for taxation, of the grand list of Concord for 1857, upon which the tax in question was assessed.

It appeared that the listers, who made up this grand list, had not appended to the same, or in any way made, a sworn certificate in conformity with the provisions of sec 2 of No. 47 of the acts of 1856. See acts of 1856, p. 52.

One of the listers for that year testified that he declined to sign or swear to the oath printed on the blanks furnished for the listers, because it was not according to the facts, and that, as a substitute, they attached a certificate of the abstract of the list, such as is required to be returned to the legislature, but that they did not swear to this certificate.

The court held that the grand list in question was sufficiently completed to become the legal basis of taxation and rendered judgment for the defendant, to which the plaintiff excepted,

— — — — — for the plaintiff.

O. F. Harvey and *T. Bartlett*, for the defendant.

REDFIELD, Ch. J. We have spent some time in examining this case with a view to find some allowable mode of legalizing the collection of the tax in question. We have before said that we feel bound to do this where it can fairly be done. Any other course of construction in the revision of the doings of subordinate municipal officers, would become an intolerable grievance, and render such duties so hazardous that no prudent man would be willing to incur the peril. This would fling them of necessity into the hands of the more reckless and desperate, a disposition which we should feel reluctant to encourage where it could fairly be avoided.

But there is one defect in the grand list of the town of Con-

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cord, in this case, which seems to us to leave it incomplete. We understand that the list does not become the legal basis of taxation until it is completed by the listers and returned as such to the town clerk's office. The terms of the statute are, "it shall be the duty of the listers to complete and return the list as finished, to the office of the town clerk." And the statute expressly requires that "such listers shall attach to such list a certificate, *signed by such listers and verified by oath* before a justice of the peace," giving the form of the oath in the act of 1856, which was in force at the time this list was made.

Now nothing of this kind was done. We are not left to conjecture or intendment in the matter. The exceptions state that the list did not appear to be signed or certified by the listers, and one of the listers testified that he declined to sign or swear to the oath printed on the blanks, because it was not according to the facts, being made in conformity to the Compiled Statutes, which had been superseded by the act of 1856.

As a substitute they attached a certificate of the abstract of the list, such as is required to be returned to the legislature, and this did not appear to have been verified by oath. This could not in any just sense be regarded as evidence of any compliance with the requirements of the statute.

Unless, then, it is competent for the listers to return the list as the completed list of the property of the town and the perfected basis of taxation for the coming year, without signing or making oath to its correctness, this cannot be regarded as a compliance with the statute. We think such a latitude of departure from the requirements of the statute is scarcely allowable in any case. An additional section in the act, provided for this, when the listers forget to comply with the requirements of the statute, or, as in this case, declined to do it, would sound positively ludicrous. And we cannot comprehend how it is possible for the court to hold that in the way of construction, which if it had been expressed would be absurd, and thus absolutely repeal the most significant requirement of the law upon this subject.

And we do not see how we can regard the requirement as merely formal like the oath of office, or giving bonds, where that is not made an express condition precedent. If it were of

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that character we might treat it as merely directory to the officer, and not affecting his official capacity as an officer *de facto*, or we might treat it as one of those forms which courts presume to have been complied with, from the fact of assuming the functions of office.

But this requirement does not seem to us of that character. It is not only a substantive requirement and one of essential importance, and a safeguard which the tax payers have the right to insist upon in all cases ; but it seems to have been regarded as an indispensable act, to mark and indicate to all the fact of the completeness of the doings of the listers. Before that appeared upon the list, no one was bound to regard it as the completed list of the town, and until completed it could not legally form the basis of taxation either in the town or school districts ; *Henry v. Chester*, 15 Vt. 460.

It seems to us impossible to escape from this conclusion without entirely disregarding the substantial provisions of the statute and the spirit of all the former decisions of this court upon the subject. We are, therefore, reluctantly compelled to the conclusion that this judgment must be reversed and the case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA,
AT THE
AUGUST TERM, 1859.

PRESENT:
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. JAMES BARRETT, }

BRADLEY MORRISON v. WALTER BUCHANAN and JOHN
BUCHANAN.

Arbitration and award. Power of arbitrators to award costs.

An arbitrator has no power to award costs of arbitration except when it is expressly given him by the submission.

A submission to arbitrators of all controversies between M. and B., (such con-

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troversies being represented by suits between them, a part in favor of one, and a part in favor of the other,) provided that the parties should "abide the award of the arbitrators, and costs to be awarded to the parties who may succeed in said action, meaning all actions between the parties." *Held*, that this submission at most only authorized the arbitrators to award to either party so much of the costs of the reference as accrued upon the trial of the particular issues on which they respectively prevailed; and that the arbitrators having decided in favor of M. upon some of the issues and in favor of B. upon the others, they had no authority to award that B. should pay all the costs of arbitration, including the arbitrators' fees.

Under such a submission the arbitrators, after awarding to each of the parties respectively the costs already accrued in the actions in respect to which they prevailed, awarded "that B. pay the costs of the arbitration, and that we allow M.'s costs as taxed at thirty-eight dollars and nine cents," and said nothing in the body of the award about their own fees, and merely noted the amount of them at the end of the award. *Held*, that the arbitrators had made no award in regard to the payment of their fees, and that M. having paid the greater part of such fees, could not, in an action on the arbitration bond, recover of B. the amount so paid by him.

DEBT upon a bond executed to the plaintiff by the defendants, and conditioned that the defendant, Walter Buchanan, should abide the submission made by him and the plaintiff to certain arbitrators of all matters in difference between them, and should keep the award of such arbitrators,

The submission contained an agreement by the parties to the arbitration "to abide the award of said arbitrators and cost to be awarded to the parties who may succeed in said action, meaning to include all manner of action and actions, cause or causes of action, suits, bills, bonds, specifications, covenants, contracts, promises, reckonings, sums of money, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and in equity at any time heretofore had, moved, brought, commenced, sued, prosecuted, done, suffered, or committed by or between the said parties, the said arbitrators to decide the said matters of dispute as shall seem to them to be in accordance with justice and equity, and to establish the head and fall of water and the height of dam and to assess damages to either party, if any."

The award of the arbitrators was as follows: "We do award and order that all actions, suits, quarrels and controversies whatsoever had, moved, arisen or depending between the said parties

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in law or equity for any manner or cause whatsoever to the day of the date hereof, shall cease and be no further prosecuted, and that we establish the head and fall of said Buchanan's mill to be six feet and eight inches, and that the dam be leveled to that head and fall; and we further award that said Buchanan pay to said Morrison the sum of five dollars as damages for the flowing of said Morrison's land by the water of said Buchanan's mill pond, and the sum of thirteen dollars and eighty-nine cents as costs in the suit now pending in the county court for flowing said Morrison's land, and the sum of seven dollars and sixty-five cents costs in the chancery suit of *Buchanan v. Morrison and others*, entered at the June Term of the Caledonia county court; and we also award that said Buchanan pay the costs of this arbitration, and that we allow the said Morrison's bill of costs, as taxed, at the sum of thirty-eight dollars and nine cents, making in all the sum of fifty-nine dollars and sixty three cents. We award that said Buchanan recover of said Morrison his costs in the suit of *Morrison v. Buchanan*, for assault and battery now pending in the county court, taxed and allowed at six dollars and five cents, to be deducted from said sum of fifty-nine dollars and sixty-three cents, leaving the sum of fifty-three dollars and fifty-eight cents to be paid by said Buchanan to said Morrison on or before the 1st of January, 1858, and said dam to be leveled to the pitch above directed on or before the 10th day of June 1858. In witness whereof we have hereunto set our hands and seals this 22d of October, 1857.

J. W. Batchelder, time and expenses,	\$32 00
John Felch,	25 00
William Adams,	25 00 "

The cause was tried by the court at the December Term, 1858,
—POLAND, J., presiding.

The only question at issue was whether the plaintiff was entitled to recover of the defendant the amount of the arbitrators' fees.

The plaintiff offered parol evidence to prove the following facts, which evidence was objected to by the defendant, but admitted subject to exception by the defendant. The parol evidence proved that the arbitrators made and signed their award,

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and taxed their own fees on the award at the foot of the same as above set forth, and that they designed and expected the same would be paid by the defendant, as part of the costs of the arbitration, the costs named in the body of the award being only the cost of the plaintiff's witnesses before the arbitrators. After the award was made and signed, and before it was published, the arbitrators called on the parties to pay their fees, saying it would make no difference which party advanced them. Neither the plaintiff nor the defendant had sufficient money to pay the whole, but it was finally arranged that the plaintiff should advance fifty dollars of the sum and the defendant thirty-two dollars, which was accordingly done, and thereupon the arbitrators published their award. It did not appear that it was then distinctly stated that the defendant was to pay the arbitrators' fees, but the court found from the evidence that it was so fully understood by all the parties at the time.

In rendering judgment, the court did not regard any of the facts proved by parol, except that the sum named in the body of the award, as the plaintiff's costs of the arbitration, included only the fees of his witnesses, and that the arbitrators' fees were taxed on the award as such, at the time it was published. Upon these facts, and the papers above set forth, the court rendered judgment for the plaintiff to recover the sums named in the body of the award and the fifty dollars paid by the plaintiff toward the fees of the arbitrators, to which the defendant excepted.

A. Underwood, for the defendants.

1. The question of *costs of arbitration* was never submitted to the arbitrators, but only *costs of suit* pending between the parties. Therefore, the arbitrators were not authorized to award as to those costs; *Candler v. Fuller*, Willes 62; *Brown v. Warden*, 1 H. B. 223; *Street v. Rogers*, 2 Eng. C. L. 76; *Peters v. Pierce*, 8 Mass. 398; *Alling v. Munson*, 6 Conn. 696; *Culler v. Whittemore*, 10 Mass. 442; *Watson on Awards*, 97.

2. But if the arbitrators had power to award costs of arbitration, they have done so, and have awarded a specified sum, viz: thirty-eight dollars and nine cents. Their award in this respect is plain and unambiguous, and must govern the parties, and can-

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not be affected by parol testimony showing a different understanding on the part of the arbitrators; *Gordon et al. v. Mitchell et al.* 4 Eng. C. L. 432; *Legge v. Young*, 32 Eng. L. & Eq. 433.

Dewey & Anderson, for the plaintiff.

The award, in providing that the defendant, Walter Buchanan, should "pay the costs of this arbitration," expressly provides that he should pay the arbitrators' fees, which are a portion of the costs of the arbitration. The minute of the arbitrators' fees at the foot of the award is a part of the award itself, and the whole should be construed together; *Jackson v. Ambler*, 14 Johns. 96; *Spear v. Hooper*, 22 Pick. 144; *Rixford v. Nye*, 20 Vt. 132; *Kendrick v. Tarbell*, 26 Vt. 416; *Wright v. Smith*, 19 Vt. 110.

REDFIELD, Ch. J. The important proposition discussed at the bar, how far an arbitrator may award costs, and especially the costs of the arbitrator, when no such power is expressly given in the submission, is one of considerable practical importance. Upon principle it would seem that no such power should exist. It is quite too important a power to be implied as a mere incident of the submission. The implication from the omission to specify such a power in the submission, is rather that it was not intended to be conferred, than that it was supposed to follow the award of damages. The more natural and the safer construction of submissions to arbitration is not to extend them beyond the words used, unless there is some very obvious ground of extending their import by way of implication.

In regard to the rule of construction in the decided cases upon this point, we find nothing which is satisfactory to our minds, giving the power, as a mere incident of the submission, to award such costs. It is obvious that such is the ordinary result when an award is made in a case pending in court, when the submission is made a rule of court. This is expressly so provided by our statute, and is so also by the English statutes, when the arbitrator so directs.

But it seems to be made a question in the English courts how far a general power to award costs, expressly provided in the submission, extends to the costs of the reference.

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It is obvious, we think, from the early English cases, *Candler v. Fuller*, Willes 62, 64, and cases there cited by the court, and the note of the reporter, that at common law the arbitrator had no power over the costs of the reference, unless it were expressly given in the submission; *Burfield v. Burrford*, Cro. Jac. 577. The reason assigned in the cases is that it was matter subsequent to the submission and could not, therefore, fairly be regarded as submitted by implication. But the power to award the costs of an action, which have already accrued, seems to be implied from the submission of the action or from the submission of all controversies; *Roe v. Doe*, 2 Term 614; 2 Pet. Ab. 254 and notes.

And it has been decided that the general power to award costs, expressly given by the submission, does not include the costs of the reference; *Bradley v. Farnstow*, 1 Bos. & P. 34. But where it was provided in the rule of reference that costs should abide the event of the award, it was held to include the costs of the reference: *Wood v. O'Kelley*, 9 East 436. But upon a submission of a cause, and all matters of reference, and nothing said of costs, the arbitrators may award the costs of the cause, but not of the reference; *Keith v. Robinson*, 1 B. & C. 277.

The rule of law upon this subject seems to be different in different States in this country. In Massachusetts, from an early day, it has been held and repeatedly reaffirmed that an arbitrator has no power to award costs unless expressly given in the submission; *Peters v. Pierce*, 8 Mass. 398; *Vose v. How*, 13 Met. 243; *Maynard v. Fredrick*, 7 Cush. 247. This rule has been adopted in many of the other States; *Gordon v. Tucker*, 6 Greenleaf 247. In this last case, the case of *Roe v. Doe*, 2 T. 644, is doubted. See also *Hawson v. Webber*, 40 Maine 194. The same rule has been adopted in *Clement v. Comstock*, 2 Mich. 359; and in the English courts, under the common law procedure act of 1854; *Legge v. Young*, 32 Eng. C. L. and Eq. 433.

A different rule has been adopted in Connecticut, by a divided court, on the ground of the practice in that State; *Alling v. Munson*, 2 Conn. 691. And in New Hampshire a similar rule obtains; *Spofford v. Spofford*, 10 N. H. 254. And a similar rule seems to obtain in New York; *Strange v. Ferguson*, 14 Johns. 161; *Cox v. Jogger*, 2 Cowen 638.

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We have not been at the pains to investigate the subject farther. The rule of the common law and of the English courts at the present day, is very obviously not to allow the authority of the arbitrator to award the costs of the reference unless that power is expressly given in the submission. And the English courts hold that where the arbitrator has power, by the submission, to award the costs of reference, this does not empower him to pass conclusively upon the amount of his own fees; *Coombs in re.* 4 Exch. 839; *Fitzgerald v. Graves*, 5 Taunt. 342. The English courts hold this altogether independently of the reasonableness of the sums fixed by the arbitrator for his own fees, upon the ground that no man can be a judge in his own case, unless the power is expressly given. We think the reason and principle of the thing is in favor of the English rule upon this subject. And to the extent of not allowing the arbitrators to award the costs of the reference, unless authorized by the submission, the weight of American authority seems to be in the same direction.

It only remains to inquire whether any such authority is given the arbitrators in this case by the submission. The submission is of all matters of difference, and an express provision that "costs shall be awarded to the parties who may succeed in said action, meaning to include all manner of action and actions, cause or causes of action," etc., between the parties. For the purpose of giving construction to these words it is competent to look into the state of the disputes between the parties at the time of the submission. This is sufficiently apparent from the award. It consisted, on the part of the plaintiff, of a suit for flowing the plaintiff's land, and a bill in equity for some decree connected with the same subject probably. The only positive claim made by the defendant was for an assault and battery, for which suit was then pending. The controversies between the parties then consisted of three pending suits, but not all in favor of the same party.

The provision, then, in regard to costs, in the submission, is satisfied by the arbitrators awarding the costs of the pending actions in favor of the party prevailing in the particular action. And this will fairly enough include the expense of the trial of the particular action before the arbitrator, such as witnesses and

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other taxable costs. This the arbitrators have done, and made their award accordingly. But it is obvious they have not, in terms, awarded anything more. If we were to conjecture what the parties probably meant, we might naturally enough conclude that they expected to have the costs of the arbitrators included in the costs of the actions. I think myself this would have been a fair and reasonable construction of the provision in regard to the costs of the actions. And if the actions had all been decided the same way, that is, in favor of the same party, it would now be easy enough to give it that operation, as was done in *Wood v. O'Kelly*, 7 East 436. But this award is not of a single action, as in that case, or of different actions in favor of the same party, but in favor of different parties. There should, therefore, have been an apportionment of the fees of the arbitrators, according to the expense belonging to those decided for each party. This was not done, and it is now too late to amend the award. And we do not think the arbitrators had authority by the submission to award the payment of their own fees, except as incident to the trial of each action. They could not then direct the defendant to pay the whole of those fees. If they could do that, then they could have awarded that the plaintiff should pay all their fees. They could at most, according to the submission, have included their own fees, while trying each particular suit, in the costs of that suit, and then left that party to pay them such proportion of their fees as he received, and were allowed him in the award as costs in the suit in which he prevailed.

But nothing of this was done. And judging from the award merely, with reference to the subject matter, and we have no right to go beyond this in giving construction to a written award, we should conclude, either that the arbitrators' fees had been included in the costs allowed in the several suits, or that no award in regard to costs had been made, or none such as came within the powers delegated to the arbitrators by the submission. We say this in regard to that clause in the award, "that the said Buchanan pay the costs of this arbitration." If that were to be understood generally as including all the costs of the arbitration, it clearly is not in conformity to our view of the just import of the submission, that costs should follow the event of the several

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snits submitted. But we think this clause is qualified by what follows, "and that we allow said Morrison's bill of costs as taxed." This expression "as taxed" explains, to my mind, how the arbitrators, in fact, failed to make any award in regard to their own fees. They allowed the costs of the parties, as taxed, in the several actions, but this taxation did not include their fees, and on that account probably it occurred that no specific award was made on the subject. There is no doubt an equity that the plaintiff should recover just about that amount of fees, which he paid, above what the defendant paid. For whatever part of the fees are incurred in the trial of the case against the plaintiff should have been paid by the defendant, and taxed in his costs, and deducted from the plaintiff's costs, and he should have had a final award for the balance. But we have not been able to discover any legal process by which we could come at this result, in the present imperfect state of the award, and, as we have said, it is now too late to amend it. It seems to us that as no legal award was made in regard to the arbitrators' fees, no recovery can be had in regard to them.

Judgment reversed and case remanded.

JOSEPH IDE v. THE PASSUMPSIC AND CONNECTICUT RIVERS
RAILROAD COMPANY.

Railway bond. Pleading.

A railway bond payable to bearer is a negotiable instrument, and may be declared upon and described in an action of assumpsit as a "bond;" and a count thereon describing the cause of action as a "bond," and setting forth the promise contained in the bond, need not aver a consideration, and may be joined with the common counts in *indebitatus assumpsit*.

The plaintiff's declaration contained six counts. The first was as follows:

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"In a plea for that the said defendants, heretofore, to wit, on the first day of December, 1849, executed their bond of that date, No. 114, signed by their President, Erastus Fairbanks, and their Treasurer, Nathaniel P. Lovering, acknowledging that they were indebted to Joseph Tilden, or bearer, in the sum of two hundred dollars, and promising to pay said sum to the holder of said bond at the office of their treasurer in Boston, on the first day of December, 1856, and the interest semi-annually, and the plaintiff avers that he is owner and holder of said bond, and that the time of payment has long since elapsed, and the defendants, though often requested, have ever refused and neglected to pay the same when demanded at the office of their treasurer in Boston."

The second, third, fourth and fifth counts did not differ from the first in any respect, except that a bond of a different number was described in each of them. The sixth count comprised the common counts in *assumpsit*.

The defendants demurred specially to the declaration, on the ground that the causes of action set forth in the first five counts being upon certain bonds, could not be joined with the last count, which was in *assumpsit*.

But the county court, at the December Term, 1858,—POLAND, J., presiding,—adjudged the declaration sufficient, to which the defendants excepted.

T. Bartlett, for the defendants.

A. J. Willard, for the plaintiff.

REDFIELD, Ch. J. The only question which seems to be raised in the argument of the demurrer in this case, is in regard to the form of the action and the joinder of counts. There can be no question that the whole declaration is in *assumpsit*. The only remaining question then seems to be, whether the term *bond*, is such an indication of the form of the contract as to exclude an action of *assumpsit*? It is true, in *Denton v. Adams*, 6 Vt. 40, the court held that the words "writing obligatory," in a declaration upon a jail bond, imported that the instrument was signed

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and sealed, since it would not become a writing obligatory without signing and sealing. These words are of the same import as *deed in writing*, which clearly implies both signing and sealing.

Terms of this kind vary somewhat in their import with reference to the subject matter. Jail bond, and sheriff's bond, when the statute requires them to be executed under seal, would naturally enough imply sealing and signing, as has been held in regard to the term "writing obligatory."

But we are not prepared to say that the word bond, *ex vi termini*, implies a contract under seal. The term is used in various significations in popular language, as importing the substantive action expressed by the verb to bind. If one is bound, he is in bonds or under bonds. In that sense it implies nothing more than a binding contract, in whatever form. And although, in the phraseology of the law, the term usually denotes a specialty, we do not think it necessarily implies that, in the connection in which it is used in this declaration. Here it is used as the name of that class of contracts issued by railway companies, and secured by the mortgage of their roads. These instruments are made payable to the trustee named in the mortgage, or bearer, or to bearer generally, and pass, by delivery from hand to hand, as money. So also with coupons attached for the semi-annual interest. They are called bonds, or railway bonds, but they are in fact, both the bonds and the coupons, mere bills or notes, and as strictly negotiable as bank bills. They have become a kind of currency in the country, and pass current at the banks until discredited. They are not, or should not be, under seal, and we suppose are not of late, certainly. And if they were, it might become necessary for the courts to disregard that incident, in order to give them that legal operation which the unwritten law of commerce has already given them.

We think, therefore, that notwithstanding the use of the term, bond, this declaration describes a note, or a bill, and as such, that such contract may be declared upon, the same as bills of exchange, or promissory notes, as an instrument importing a consideration.

It has been before held that the bearer may maintain an action upon these instruments in his own name, both in the State and United States' courts. It would be strange to hold otherwise

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after the paper had, by common usage, become a currency of the country and the world.

In this view there is no fatal defect in the declaration, or any misjoinder.

Judgment affirmed.

ENOCH G. PARKER v GRANVILLE MEADER.

Deposition. Officer. Libel.

An officer serving a citation upon one to be present at the taking of the deposition of another, should make return of his doings to the authority issuing the citation.

Therefore, *held*, that a citation, signed by a justice of the peace in Orange county, and addressed generally to any sheriff or constable in the State, notifying the defendant in a suit pending in Caledonia county to appear out of the State at the taking of a deposition of another party to be used in such suit, might properly be served on the defendant in Caledonia county by a deputy sheriff of Orange county.

The words, "he was married to a woman" (naming her) "and kept her till he got sick of her, and then sent her away, he having all this time two wives," amounts to a charge of bigamy, and is libelous.

CASE for libel. The cause was tried by jury, at the December Term, 1858, — POLAND, J., presiding. On trial the plaintiff offered the deposition of one Marstin, to the admission of which the defendant objected on the ground of the insufficiency of the service upon him of the citation to appear at its taking. The defendant was a resident of Groton, in Caledonia county, where the citation was served upon him. It was addressed generally to "any sheriff or constable in the State," and was signed by a justice of the peace for Orange county, where it was dated and signed, and it summoned the defendant to attend at the taking of the deposition in Lawrence, Massachusetts. The defendant claimed that an officer of Orange county, as such, had no author-

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ity to serve this citation in Caledonia county, but the county court held otherwise, and admitted the deposition, to which the defendant excepted.

The alleged libel was set forth in the declaration as follows :

"Parker (meaning the plaintiff) was married to this M. J. Martin (meaning the said Mary Jane Martin) in Manchester, (meaning the city of Manchester in the State of New Hampshire, meaning that the plaintiff was by his own corrupt will and consent joined in wedlock with said Mary Jane Martin while he, the plaintiff, had a lawful wife in full life and being.) He (meaning the plaintiff) kept her (meaning the said Mary Jane Martin) until he (meaning the plaintiff) got sick of her, (meaning the said Mary Jane Martin.) He (meaning the plaintiff) then sent her (meaning the said Mary Jane Martin) away in the fall, (meaning in the fall of 1855.) All this time (meaning from March 1853 to the fall of 1855) he (meaning the plaintiff) had two wives, (thereby meaning that the plaintiff had committed the crime of bigamy.)"

The jury returned a verdict for the plaintiff, after which the defendant moved in arrest of judgment for the insufficiency of the declaration, but the court overruled the motion, to which the defendant excepted.

Bliss N. Davis, for the defendant.

C. C. Dewey and S. B. Colby, for the plaintiff.

PIERPOINT, J. The first question submitted for our consideration is as to the admissibility of the deposition of Marstin.

It is insisted by the defendant that he was not notified to attend the taking of the deposition according to the provisions of the act of 1854. The notice was served on the defendant in Groton, Caledonia county, by a deputy sheriff of Orange county, to attend the taking of the deposition in Lawrence, Massachusetts.

The notice was issued by a justice of the peace in Orange county, directed to any sheriff or constable in the State, commanding such officer to make service thereof and return according to law.

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It is conceded that the officer serving this process had no authority to serve it in Caledonia county, unless it be considered as a process returnable within Orange county, where the officer resided, so as to come within the provisions of the act extending the jurisdiction of sheriffs and their deputies.

We think that the citation issued by the justice in pursuance of the statute, is a *returnable* process. The statute prescribes that a party shall be notified of the taking of the deposition, either by personal notice given by the magistrate taking it, or by a citation issued by a justice to be served on the party in the same manner as a writ of summons, and that no deposition, taken without such notice being given, shall be read as evidence. If notice be given by the magistrate personally, his certificate of that fact would be taken as evidence of it. But when the notice is given by citation, whether issued by the magistrate taking the deposition or by another magistrate, (as is usually the case,) the citation with the officer's return thereon, is the best evidence that the notice has been given as required by the statute. If the officer is not required to make a return of his doings, how is it to be known to others, besides him and the person on whom it has been served, that any service of the process has been made? The fact is to be established to the satisfaction of the magistrate who takes the deposition, and the court before which it is to be used, and this can be done in no other way so satisfactorily as by the official return of the person legally authorized to serve and return it.

If then a return is to be made by the officer making the service, *to whom* is it to be made? We think it should be returned as all other processes are, to the magistrate or authority issuing it, unless upon the face of the process, or by some express provision of law, it is made returnable elsewhere. In cases of this kind, it could, be propriety, be made returnable only to the magistrate who issued it, or to the one who is to take the deposition. To make it returnable to the latter would be, in a great majority of cases, impracticable, but a return to the former would be attended with no difficulty, and when done, it places the process and the evidence of its service where it can always be rendered available to prove the notice to the satisfaction of the magistrate taking the deposi-

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tion, that he may certify the fact, and also to prove the manner and extent of the notice, if any question should be raised about it, before the court where the deposition is offered.

Such being the case, the notice was regularly served, and the deposition properly admitted.

It is urged in support of the motion in arrest that the plaintiff has not alleged in his declaration that at the time of publishing the matters complained of, the defendant knew that the plaintiff had a wife living; and that this is necessary to show that the defendant acted with malice, inasmuch as the language used does not import any crime, and does not amount to a libel, unless the plaintiff had a wife.

We think this objection grows out of a misapprehension on the part of counsel, as to what the declaration contains. As we understand the declaration, it alleges that the defendant published of the plaintiff, that in March he came up here and brought a woman, by the name of Mary Jane Martin, and lived with her a year and one-half; that he was married to her in Manchester, and kept her until he got sick of her; and then, in the fall, sent her away, he having all this time two wives.

This we think is an allegation, on its face, of matter, that is libelous, and imparts malice.

The offence consists in publishing that the plaintiff lived with and married another woman, when, at the same time, he had two wives.

If we are correct in our reading of the declaration, this objection falls to the ground.

The result is, the judgment of the county court is affirmed.

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JOHN Q. HOYT v. JOHN M. SMITH.

Slander.

Though it is not proper to join in the same count as grounds of recovery a slander and a libel, yet when the written accusation is matter of inducement and prelliminary to the verbal one, it may be set forth as such in the declaration.

In an action for slander it is proper to include in a single count words spoken at different times, and to different persons, in relation to the same subject.

In an action for slander the innuendoes "*meaning to insinuate and falsely represent,*" "*meaning to insinuate and be understood,*" or "*meaning and intending to represent,*" "that the plaintiff had stolen the money aforesaid," indicate that the defendant's charge against the plaintiff was that he had stolen the money, and are therefore sufficient.

Upon a motion in arrest of judgment in an action of slander the allegations in the declaration are to be examined in connection with the whole record, and if, though imperfect in themselves, the imperfection is supplied by an admission in the plea, the motion in arrest will be overruled.

The declaration in slander in this case considered, and adjudged sufficient on a motion in arrest after verdict for the plaintiff.

CASE for slander. The declaration was as follows :

"In a plea of the case for that the plaintiff says that he now is an honest and faithful citizen of the State, and as such has always behaved and conducted himself, and until the committing of the several grievances by the defendant hereinafter mentioned, was always esteemed, reputed and accepted by and amongst all his neighbors and other good citizens of the State to whom he was in any wise known, to a be person of good name, fame and credit, and the plaintiff has never been guilty, or until the time of committing of the several grievances by the defendant, as hereinafter mentioned, been suspected to have been guilty of theft, robbery or any felony, or any such crime, by means of which said premises he, the plaintiff, before the committing of the said several grievances by the defendant, as hereinafter mentioned, had deservedly obtained the good will and credit of all his neighbors and other worthy citizens of the State to whom he was in any wise known, and before committing the several grievances hereinafter mentioned, to wit, on the 29th day of December, 1856,

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he, the plaintiff, held the commission of deputy postmaster at Stevens' Village, in Barnet aforesaid, under the post office department of the United States, and had so held such commission for a long time before, and did then and there discharge the duties of said commission in such office, and had for a long time before performed and did then perform the duties pertaining to such appointment, without being guilty of any malfeasance or misfeasance in such office, and as a faithful, honest deputy postmaster at said Barnet aforesaid, on the year and day aforesaid, and a long time before, was so accredited and esteemed by the post office department of the United States, and by his friends and neighbors, citizens of Vermont and residents of said Barnet, who were interested and did business at the post office of which the said plaintiff so had charge at said Barnet, yet the defendant well knowing the premises, but contriving and intending maliciously and wickedly to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of the State, and to cause it to be suspected and believed by those neighbors, citizens and the post office department of the United States, that the plaintiff had been and was guilty of feloniously taking from the post office at said Barnet, of which the plaintiff then and there had the charge, as deputy postmaster aforesaid, a valuable letter containing forty-six dollars in current bank notes, and thirty postage stamps of the value of ninety cents, and to subject him to the pains and penalties inflicted by law on persons guilty of such offences, and to vex, harass, oppress, impoverish and wholly ruin him, (the plaintiff) he (the defendant) on or about the 9th day of January, 1857, communicated and published in writing to Ephraim Nois, then of Hardwick, in the county of Caledonia, the following false intelligence, among others, to wit, "I (meaning the said defendant) sent you (meaning the said Ephraim Nois) \$46.90 by mail on the 29th day of December (meaning forty-six dollars and ninety cents on the 29th day of December last) directed to E. Nois, (meaning Ephraim Nois) Hardwick, Stevens' Village, Vt. I (meaning the said defendant) sent it (meaning the money) according to the directions you (meaning the said Nois) left with Mr. James Welch.

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The odd change (meaning the ninety cents) was in postage stamps." Which false and malicious intelligence was received by said Ephraim Nois and accredited as true, while the said defendant was well knowing to the contrary; and that he never sent by mail any such sum of money or odd change in postage stamps in any such letter or any letter whatever directed as aforesaid, or put or caused the same to be put into a post office to be mailed or otherwise. And the said defendant further maliciously and falsely intending to charge upon the plaintiff the crime aforesaid, and before the committing of the said several grievances hereinafter mentioned, did on or about the 13th day of February, 1857, further publish and declare in a certain letter directed by the said defendant to one E. B. Guyer, of South Hardwick, Vermont, among other things the following false intelligence in writing, to wit, "Respecting the letter and money which I (meaning the defendant) sent to friend Nois (meaning Ephraim Nois aforesaid) I (meaning the defendant) will give you (meaning the said Guyer) the particulars. On the 29th day of December last I (meaning the defendant) took four ten dollar bills, one five dollar bill, one one dollar bill, put them in a letter, and then I (meaning the defendant) put the letter and money into an envelope. I (meaning the defendant) went to the post office in this place (meaning the post office at Stevens' Village, in said Barnet,) and saw Mr. Hoyt, the postmaster, (meaning the plaintiff.) I (meaning the defendant) bought of him (meaning the said plaintiff) thirty letter stamps, and handed him (meaning the plaintiff) a one dollar bill. He (meaning the plaintiff) gave me back ten cents. I (meaning the defendant) then took the letter out of my (meaning his) memorandum book and folded the stamps (meaning the letter stamps) in the presence of Mr. Hoyt, (meaning the plaintiff) so they would go into the letter. Mr. Hoyt (meaning the plaintiff) saw the edges of the bills when I (meaning the defendant) put the stamps into the letter. I (meaning the defendant) sealed the letter (meaning the letter containing the money and letter stamps) in his (meaning the said Hoyt's) presence. I (meaning the defendant) told him (meaning said Hoyt) I (meaning said defendant) wanted the letter (meaning the letter aforesaid) to go out that day (meaning the day on which the said defendant put into said

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letter the stamps and money) for it was a valuable letter, and he (meaning said Hoyt) told me it should, (meaning said letter.) I (meaning the defendant) started to go out, (meaning out of the plaintiff's office;) I (meaning the defendant) looked through the square boxes in the office, (meaning the post office aforesaid;) I (meaning the defendant) saw him (meaning the said Hoyt) turn the letter (meaning the letter aforesaid) over and look at it, which he (meaning the said Hoyt) never did with any other of the letters that I (meaning the defendant) handed him in the office, (meaning the said Hoyt's office.) There was another gentleman in the store who heard what I (meaning the said defendant) said to him, (meaning the said Hoyt) and saw me (meaning the said defendant) purchase the stamps of John Q. Hoyt. On the 9th of January I (meaning the defendant) received a dunning letter from Mr. Nois (meaning the said Ephraim Nois) saying that I must send a check on the Beloit Bank, Wisconsin, for the balance of the oats. I (meaning the defendant) then began to have suspicion that Mr. Hoyt (meaning the plaintiff) had taken the letter containing the stamps and money aforesaid."

Which letter in writing containing such false and deceitful intelligence was on or about the 13th day of February, 1857, received by said Guyer as if true, the said defendant well knowing the same to be untrue and false, nevertheless the said defendant further maliciously contriving and intending to injure the plaintiff in his good name and credit, and to deprive him of his business as deputy postmaster, and the profits and gain thereof, and to bring him to scandal, disgrace and infamy, and to subject him to punishment, did on or about the 7th day of January, 1857, in a certain discourse then and there held at said Barnet, of and concerning the plaintiff, and of and concerning the letter, money and postage stamps aforesaid, utter, speak and publish falsely and maliciously the following words in the presence and hearing of divers persons, that is to say, "Hoyt (meaning the plaintiff) has got the money, (meaning that money before described as enclosed in a letter directed to Ephraim Nois as aforesaid) meaning and intending to insinuate that said Hoyt had withheld the letter aforesaid, and feloniously taken the money therefrom, and had committed the crime of larceny. Hoyt (meaning the plain-

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tiff) has got that money and postage stamps, and if I had not done just as I was requested to do, I should have brought a suit against Hoyt three weeks ago," meaning and intending to insinuate and falsely represent that he, the defendant, had mailed forty-six dollars in bank notes to the address of Ephraim Nois, as the said Nois had requested, by delivering the same to said plaintiff as postmaster at said Barnet, and the odd change in postage stamps, and that said Hoyt had stolen the same and was liable therefor, and as such, he, the defendant, would have brought an action against said Hoyt to recover the same, had he, the said defendant, not mailed the same as he, Nois, had directed the defendant.

And the defendant continuing his malice did then and there, in the hearing of divers persons, utter and speak the following false and scandalous words of and concerning the plaintiff, that is to say, I, (meaning the defendant) on the 29th day of December last, put into an envelope four ten dollar bank notes, one five dollar bank note and one one dollar bank note, all on the Bank of Newbury, and thirty postage stamps for ninety cents, directed to E. Nois, Hardwick, Stevens' Village, Vermont, with a letter addressed to said Nois. I (meaning the said defendant) handed the said envelope containing the letter, postage stamps and money, to John Q. Hoyt, requesting him to forward the same that day, stating to him, Hoyt, that said letter was valuable. I (meaning the defendant) saw said Hoyt behind the post office box hold the letter between him and the light, which excited my suspicion at the time. The letter has never been received by said Nois. Hoyt has got it. Meaning to insinuate and be understood that said Hoyt had stolen said letter, money and postage stamps, and thereby was guilty of a felony, (meaning and intending to charge him, the said plaintiff, with such crime.)

And the said defendant continuing his malice as aforesaid, on or about the 10th day of January last aforesaid, at said Barnet, did utter, speak and publish falsely and maliciously the following words in the presence and hearing of divers persons, citizens as aforesaid, to wit, in speaking of and concerning the letter, money, postage stamps and envelope aforesaid, he, the said defendant, said, "I know that Hoyt has got the money and I can prove it," meaning and intending to represent that said Hoyt had stolen the

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money before mentioned, and that he, the defendant, could prove it. Whereas in truth and fact, the defendant, at the time of his speaking and publishing the aforesaid words, had not handed or delivered to said Hoyt, as postmaster at said Barnet, any such letter containing money and postage stamps addressed to E. Nois as aforesaid, so by him asserted, or to the said Hoyt any such letter. By means of speaking of the said false and scandalous words of and concerning the plaintiff, and of and concerning the letters aforesaid, concerning the said Hoyt as deputy postmaster at said Barnet, he, the said plaintiff, was not only greatly injured in his good name and reputation, but was taken to have committed and been guilty of theft, and of taking a valuable letter from the post office in Barnet, containing forty-six dollars in money and ninety cents' worth of postage stamps, feloniously, by which he has lost the esteem and good will of many persons of business, wealth and influence, with whom he had before very large and profitable concerns, but who of late have refused to trust him with their property or to continue any connection with him whatsoever, by means of which he has sustained great damage, to wit, three thousand dollars, at Barnet. aforesaid, for the recovery of which with just cost the plaintiff brings suit."

The defendant pleaded the general issue, with the following notice of special matter in justification.

"And the defendant gives notice that under said issue he will offer evidence tending to prove that the defendant, on the 29th day of December, 1856, put a letter into the post office kept by the plaintiff at Barnet, containing forty-six dollars in money, and thirty United States postage stamps of the value of ninety cents, and that said letter was sealed and addressed to one E. Nois, at Stevens' Village in East Hardwick, to be by the plaintiff transmitted to the said Nois, by mail; that the plaintiff took said letter, but did not send the same by mail to the said Nois, or transmit the same in any way by mail from his said office, but kept and detained said letter and money, and converted the same to his own use, and the defendant, speaking of said letter and money so lost by him and kept by the plaintiff, did *write* the words set forth in the plaintiff's declaration, and did also speak the same

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words, in said declaration set forth, as he might well do, for the words so written and spoken are true."

The case was tried by jury, at the December Term, 1858,—POLAND, J., presiding. The plaintiff on trial waived all claim to recover for the words charged in the declaration as having been written by the defendant of the plaintiff, and the case was submitted to the jury upon those portions of the declaration only which charge the defendant with speaking slanderous words. The jury returned a verdict for the plaintiff, and the defendant filed the following motion in arrest of judgment.

"And now after verdict comes the defendant, and before judgment moves the said court that said verdict be set aside and said judgment be arrested, and for cause saith that the plaintiff's declaration, and the matter therein alleged, are not sufficient in law to found any judgment upon in this, to wit:

1. Because such declaration contains allegations for libel joined in the same counts with allegations for verbal slander.
2. Because said declaration contains several and distinct allegations of libel and slander upon different occasions at divers times, in one and the same count.
3. That said declaration is otherwise defective and insufficient in substance."

The county court overruled the motion in arrest and rendered judgment on the verdict for the plaintiff, to which the defendant excepted.

Peck & Colby, for the defendant.

B. N. Davis, and *J. D. Stoddard*, for the plaintiff.

BARRETT, J. This is an action of slander which was tried in the county court upon the general issue, and notice of the truth of the words in justification. The plaintiff obtained a verdict. The questions before us arise under a motion in arrest, for the alleged insufficiency of the declaration.

For the purpose of a point the defendant claims that the declaration sets forth, as a cause of action and ground of recovery, *written libels*, as well as *verbal slanders*. However this might

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seem upon a first impression, an attentive examination satisfies us that such is not the case.

The idea of the pleader seems to have been that it was proper, and perhaps necessary, as a part of the preliminary averments, in order to develop the subject matter and occasion of the alleged slander, to set forth what had been done by the defendant by way of starting and giving currency to the pretence that he had deposited such a letter, with the money and stamps, in the plaintiff's post office, in connection with circumstances and incidents calculated to beget the suspicion, and perhaps the belief, that the plaintiff had kept the letter and stolen the money and stamps. This is evinced by the manner in which that matter is incorporated into the declaration, "that the defendant on or about the 9th day of January, 1857, communicated and published in writing to Ephraim Nois, the following false intelligence." Then follows the letter in words, to the effect that the defendant put the letter in the office with the money and stamps enclosed, but without any statement or insinuation that the plaintiff had kept the letter and stolen its contents. The declaration contains no innuendo that by said letter to Nois the defendant meant to charge or insinuate that the plaintiff had kept the letter and stolen the contents.

The declaration then proceeds thus: "and before the committing the several grievances hereinafter mentioned, the defendant did, on or about the 13th day of February, 1857, further publish and declare in a letter directed to Guyer, among other things, the following false intelligence in writing," etc., and then gives the said letter in words, which in effect states the particulars of the defendant's mailing the letter with the money and stamps enclosed to Nois, with incidents and circumstances, and particularly the receiving of a dun from Nois, and closes by saying, "I then began to have suspicion that Mr. Hoyt had taken the letter containing the stamps and money aforesaid." This statement of suspicion is the only thing in the letter to Guyer that looks in the direction of charging the plaintiff with having taken the money; and the declaration contains no innuendo that the defendant meant, in that letter, to charge the plaintiff with having so done; but on the contrary, it proceeds, "which letter in writing, containing said false and deceitful intelligence, was received by said Guyer

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as if true, the defendant well knowing the same to be untrue and false, nevertheless the defendant further intending, etc.," and then sets forth the speaking of the slanderous words, with proper colloquium and innuendoes. From this manner of passing from the statements as to said two letters to the setting forth of the verbal slander, it is apparent that those statements were designed and understood to be merely preliminary and introductory to the counting upon the verbal slander. This view is strongly countenanced by the omission in those statements of material elements that are indispensable in a count for *libel*, as well as by other internal evidence which the declaration contains.

Assuming that the declaration counts upon verbal slander only, it has been made a question, about which even counsel on the same side do not agree, whether it is a declaration in one, two, or three counts. We do not regard it of much importance, for the purposes of the present decision, which view should be adopted, for we understand it to be proper to include in a single count, words spoken at different times, and to different persons, in relation to the same subject, as well as to make several counts, each containing the words spoken on a single occasion; 1 Starkie on Sland. 443, Wend. Ed.

In case of a single count containing words spoken on different occasions, some of which are not actionable, if entire damages should be given upon the whole count, judgment would be arrested with as much certainty, at least, as it would be if the declaration had contained a distinct count for each set of words, and entire damage should be given. See Starkie *ubi supra*.

If we felt compelled to hold that there are more than one count in the declaration, we should be strongly inclined to there being three instead of two. But we see no occasion so to hold. We are able, with great satisfaction, to agree with the author and draughtsman of the declaration in what he claims for his own handiwork, that it is a declaration in a single count, for words spoken on several occasions.

If these views were to be adopted by the court, no question was made but that the preliminary averments are sufficient.

The next topic of debate is, whether the slander is sufficiently averred.

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In the first place, as to the first and second averments of the slander, the sufficiency of the colloquium is not questioned. In the next place, it is not denied that the words counted upon are capable of importing a charge of stealing the money and postage stamps, nor that the innuendoes make a proper application of these words in the direction of such a charge; but it is claimed that the innuendoes are not sufficiently direct and explicit to that effect.

In the first averment of slander the innuendo proceeds thus: "meaning and intending to insinuate that said Hoyt had withheld the letter and feloniously taken the money therefrom, and had committed the crime of larceny," and closes thus: "meaning and intending to insinuate and falsely represent, etc., that said Hoyt had stolen the same [the money] and was liable therefor, etc."

The second averment of slander closes by way of innuendo thus: "meaning to insinuate and be understood that said Hoyt had stolen said letter, money and postage stamps, and thereby was guilty of felony, meaning and intending to charge him, the said plaintiff, with such crime." The third averment of slander closes by way of innuendo thus: "meaning and intending to represent that said Hoyt had stolen the money before mentioned, etc."

We do not regard the criticism made by counsel to be warranted by the rules of construction, applicable to a declaration, after a verdict, under a motion in arrest; nor, indeed, to be very fully sustained by the ordinary rules of grammar. In our view the expression is tantamount to saying that the defendant meant, by the words spoken, that the plaintiff was guilty of the crime of larceny, and that he intended so to insinuate, represent and have it understood. What is thus said about *insinuating* and *representing* does not operate to blunt and round off the point of a direct averment of slander, but to carry forward the charge *meant* by the defendant into its virulent operation of insinuating and causing it to be understood that the plaintiff was, in fact, guilty of that heinous crime.

But it is further objected that the third averment is defective in not having a proper colloquium; that it does not show that the words were spoken of and concerning the *plaintiff*, but only

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of and concerning the *letter and money*. Without taking time to discuss this objection, as it would stand if it had been raised by a demurrer, it is sufficient to say that the case is before us on the whole record. That record contains the defendant's notice of special justification, which is used as a substitute for a technical plea. What it sets forth or admits, must, as a part of the record, be as effectual against the defendant as if it had been done in the form of a plea. That notice sets forth and admits the speaking of the words, and that they were spoken of and concerning the plaintiff. Upon a very familiar rule, this supplies any omission in this respect in the declaration; *Wood v. Scott* 13 Vt. 42; *Sanderson v. Hubbard*, 14 Vt. 462; 1 Ch. Pl. 671.

Only a single other objection remains to be noticed, viz: that the slander is averred to be of the plaintiff in his *official* character as postmaster, and so the words become actionable only by reason of *special damage*, yet only general damage is averred.

We deem this objection to be unfounded. The declaration, in the colloquium, states the speaking to have been of and concerning the plaintiff, not in his office of postmaster, but personally, as a member of the community. What is said about his being postmaster is in the preliminary averments, and was inserted for the purpose of showing the plaintiff's relation to the subject matter and occasion of the slander. As the words are abundantly actionable when spoken of one *personally*, in his private character and relations, it is needless to discuss whether they would be any the less so if spoken of a person in his *official* character and relations.

While we may not participate in the favor with which the author of this declaration regards it, so far as to feel warranted in commending it for study and adoption, as a model of artistic perfection, still, we think that by the rules of the law it must be held to have abundant substance and sufficient form to entitle it to sustain the verdict, as against the motion in arrest.

The judgment is affirmed.

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THE PASSUMPSIC BANK v. DAVID H. BEATTIE.

Practice. Trustee process. Execution. Officer.

In an action brought by the trustee process if judgment be rendered against the principal debtor, and one of the trustees be adjudged chargeable, and execution thereupon issue against such trustee, and the action be continued as to the other trustee, the execution so issued is so far valid that an officer in whose hands it is placed for collection, is liable for neglecting to levy and return it.

CASE against the defendant as sheriff of Essex county for the default of his deputy, one Root, in not levying and returning an execution in favor of the plaintiffs against the Island Pond Lumber Company.

The case was tried by the court at the December Term, 1858, —POLAND, J., presiding,—upon the following agreed statement of facts, viz :

The plaintiffs commenced a suit against A. Latham & Co., and trustees, the Island Pond Lumber Company, and Morrill & Lawrence, returnable at the June Term, 1855, of the Caledonia county court. Judgment was rendered against the Island Pond Lumber Company, as trustees of Latham & Co., at the June Term, 1855, and the cause was continued as against the defendants, Latham & Co., and the other trustees, to the December Term, 1855, when judgment was rendered for the plaintiffs against Latham & Co., and the cause was continued as to Morrill & Lawrence, trustees, until the June Term, 1856, when it was terminated as to them. At the rising of the court at the December Term, 1855, by leave of the court an execution was issued against the Island Pond Lumber Company, dated January 20th, 1856, and was placed in Root's hands for collection shortly after its issue, but some months before the case was disposed of as to the other trustees. At the time Root received this execution the Island Pond Lumber Company had property which might have been levied upon, but Root entirely neglected either to levy or return the execution.

Upon these facts the county court rendered judgment for the plaintiffs, to which the defendant excepted.

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Geo. C. & Geo. W. Cahoon, for the defendant.

A. J. Willard, for the plaintiffs.

REDFIELD, Ch. J. The principal question raised in this case, in regard to the validity of the execution, was decided by this court in *Spring v. Ayer*, 23 Vt. 516; *Hapgood v. Goddard*, 26 Vt. 401, and as we think upon sufficient grounds. We do not think we could render the decision more obvious or satisfactory, if we should here enter into a formal re-argument of the question. It is proper that questions of that character, after having been fully considered and favorably determined, should be regarded as no longer open to debate, as it is really nothing but a question of practice, and has been ruled in accordance with our views both of safety and convenience. We see no reason to change it.

From the facts stated in the case, we think it must have been intended that the defendant might have levied the execution upon personal property. His admission that there was property upon which the execution might have been levied, if construed either according to its ordinary import or the established rules of construction, taking the words most strongly against the party using them, must import that.

Judgment affirmed.

GEORGE W. HURLBURT v. WILLARD KNEELAND.

Principal and agent.

Where there is an actual want of authority from the principal for the acts of his special agent, the former will not be liable therefor; but *aliter*, where there is an authority for such acts, notwithstanding the agent has violated his private instructions as to the mode of its execution.

BOOK ACCOUNT. The auditor reported that shortly previous to the 1st of April, 1855, the plaintiff and defendant had a con-

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versation relative to some hay which the former proposed to sell to the latter, which conversation, however, did not then result in any contract; that a few days afterwards one Brooks called on the plaintiff and represented to him that the defendant had directed him to purchase the hay of the plaintiff on the defendant's account; that the plaintiff then sold the hay, as he supposed, to the defendant through Brooks, whom he supposed to be the defendant's agent, and that a day was agreed upon between the plaintiff and Brooks when the hay should be weighed off to the defendant.

On that day the defendant received eighteen hundred and fifty pounds of the hay, and he subsequently paid the plaintiff therefor. While they were weighing the hay, the defendant told the plaintiff's agent, who was weighing it, that he was to have the whole of it, and it was then supposed there were at least one and one-half tons of the hay.

The auditor further reported that the defendant's testimony tended to prove that he only authorized Brooks to purchase on his account one-half of the plaintiff's hay, and that the other half was purchased by Brooks on his own account.

The plaintiff offered no evidence of Brooks' authority to purchase the hay on the defendant's account, except as above detailed.

The auditor found that Brooks was authorized by the defendant to purchase one-half of the hay on the latter's account, and no more, that the defendant took that quantity and had paid the plaintiff for it, that Brooks represented to the plaintiff that he was authorized to buy the whole of the hay for the defendant, and that the plaintiff acted on this representation, supposing it to be true.

The county court, at the December Term, 1856,—POLAND, J., presiding,—rendered judgment upon the receipt for the defendant, to which the plaintiff excepted.

J. Ross, for the plaintiff.

O. T. Brown, for the defendant.

REDFIELD, Ch. J. There is some evidence reported by the

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auditor in this case which might lead one to conjecture, if not to conclude, that the auditor might without any great stretch of inference, have come to the conclusion that the defendant did ratify at least, if not authorize, the purchase of all the hay purchased of the plaintiff by Brooks, and that in fact it ought to be regarded as a purchase by the defendant.

But the facts are not so found. The auditor reports expressly that Brooks was authorized by the defendant to purchase one-half of the hay on his account, and no more, and that the defendant carried away his half and has paid the plaintiff for the same. This seems to us decisive of the case. [It is not a case where the authority extends to the whole, and special instructions are given by the principal to his agent in regard to the bargain, affecting one-half. In such case it is well settled that the principal is bound to the extent of the authority conferred notwithstanding the agent, even if he be a special agent, depart from his instructions.] This is expressly decided in the leading and familiar case of *Fenn v. Harrison*, 3 Term 754; opinion of ASHHURST, J., p. 757; BAYLEY, J., in *Pickering v. Busk*, 15 East. 45. [The elaborate opinion of Ch. J. PARKER, in *Hatch v. Taylor*, 10 N. H. 538, goes upon the same distinction. The present case seems to be one of *want of authority*, in the agent.] The contract does not, therefore, bind the defendant.

Judgment affirmed.

LUCY ANN WINN v. HARRY CHAMBERLIN.

Contract. Receipt. Evidence.

Where it is satisfactorily shown that, for any reason, the parties to a contract did not intend to reduce the whole of it to writing, and the portion omitted is not inconsistent with the written portion, the part omitted may be proved by parol evidence.

The fact that one has executed to another a receipt, not under seal, for a sum of money, and has added in the receipt that in consideration of such pay

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ment he discharges the other from a certain claim, does not prevent the latter from showing by parol evidence that the same payment was made in consideration of the discharge of another claim, as well as of that specified in writing.

COMPLAINT FOR BASTARDY. Plea not guilty, with notice that the defendant would rely on a settlement and discharge from the plaintiff. The cause was tried by the court at the December Term, 1858,—POLAND, J., presiding.

The defendant admitted that he was the father of the plaintiff's bastard child, but he offered in evidence the following receipt :

“ DANVILLE, January 26th, 1858.

Received of Harry Chamberlin the sum of fifteen hundred dollars, and in consideration thereby I hereby release and discharge the said Chamberlin from all contracts of marriage with myself, and from all claims for damages for any and all breaches of promise of marriage on his part.

(Signed)

LUCY ANN WINN.”

The defendant also offered to prove by parol evidence that while the plaintiff was pregnant with the child in question, she claimed that he was the father thereof, and also demanded damages of him for a breach of a promise to marry her ; that the parties negotiated a settlement by which the defendant agreed to pay the plaintiff fifteen hundred dollars to settle both the claim for damages for the breach of promise, and also that for the support of the child, and that the defendant procured a discharge to be written discharging him from both claims, and presented it to the plaintiff for execution ; that the plaintiff was advised that she could not legally discharge the claim for the support of the child, because the town might wish to institute a prosecution, and that therefore she refused to sign the discharge ; that the plaintiff's friends thereupon procured the discharge to be written and executed by the plaintiff which is above recited, that thereupon the defendant paid the plaintiff fifteen hundred dollars, and that at the same time the plaintiff verbally agreed that such payment should be in full satisfaction of any claim on her part and for her benefit for the support of the child, as well as for the breach of promise. It was conceded by the plaintiff that this complaint was instituted by the plaintiff and solely for her benefit.

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The plaintiff objected to the admission of the parol evidence offered by the defendant, and the county court excluded the same, to which the defendant excepted.

Bliss N. Davis, for the defendant.

T. Bartlett, for the plaintiff.

REDFIELD, Ch. J. The only question in the present case is, whether the testimony, offered to show that the present cause of action was compromised and settled, should have been received. The testimony was rejected on the ground that it was not compatible with the writing executed between the parties at the time of the settlement. It is not claimed that it tended to contradict the writing, but that it made an important addition to it, and that the writing must be presumed to contain the whole contract at that time made between the parties. That is undoubtedly the general presumption in such cases. But there are some well established exceptions to this rule. And where it is satisfactorily shown that for any reason the parties did not intend to reduce the whole contract to writing, and the portion omitted is consistent with the writing, it may be received.

Thus when the same consideration is received in payment of the price of real and personal estate, the deed of the real estate does not exclude proof of the purchase of personal estate, at the same time and upon the same consideration. This goes upon the ground that the conveyance of real estate is required to be in writing, and by deed executed with the prescribed formalities of the statute, and that consequently no presumption arises from the deed, that no personal property was included in the same contract. Some of the cases do not adopt this view, but the majority of the cases upon this subject do so hold.

And a written memorandum of a transaction will never exclude proof of stipulations not included in the writing, where both parties agree that the writing shall not contain the whole contract, unless the additional matters are inconsistent with the writing.

The writing, as far as it goes, is always conclusive between the parties, and is presumed to contain the whole contract made at the time, and if anything is omitted by mistake of either or

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both the parties, it cannot be shown. The only remedy in such case is to reform the contract in a court of equity.

But it may always be shown that the writing was obtained by fraud, or that it was not executed or delivered, or that it was not correctly read to one of the parties through the fraud of the other, or not understood by him, being in a foreign language, or that it was not intended by either of the parties to contain the whole contract. In this view the testimony rejected should have been received. The case of *Morany v. Buford*, 1 McLean 195, where after the compromise of a suit by agreement under seal, it was held an action will lie on a parol agreement of one party to pay the cost, is in point.

But in another view of the case the testimony is clearly receivable as it seems to us. This writing is nothing more than evidence of the settlement of the claim for breach of promise of marriage. It is nothing but a receipt for money, showing the claims and the terms upon which it was received. And in all such cases it is abundantly settled that the receipt is merely evidence, and although it is evidence of a more conclusive character than most other evidence, being in writing, it is nevertheless not conclusive and may be encountered by oral proof of mistake, accident, or fraud.

The difference between a receipt and a contract, is not in the form of the beginning so much as in the substance of the writing. A deed of land may begin with the words, "Received of A. B.," and a mere receipt for money may begin, "Know all men by these presents," and still be nothing but an admission of having received money in satisfaction of, or in part satisfaction of, a pre-existing debt. And if this be its only character, it is explainable and liable to contradiction by other proof resting merely in *viva voce* testimony.

To constitute a contract it must contain something more than the admission of the party to the existence of a previous fact or facts. It must either be itself a conveyance of some right, positive or negative, or else must stipulate for the doing or omission of some act on the part of the maker.

Although this writing assumes the form of a release or discharge in its language, it is not under seal and cannot operate by

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force of the contract merely. It is only the payment of the money which gives it any operation, and that is the act of the defendant, and precedes the execution of the writing. It is then in effect nothing more than the acknowledgement or admission of the fact of payment, and that it was paid in full of the claim specified.

It seems to us, therefore, that the terms used in this writing "In consideration thereof I hereby release and discharge," etc., do not alter its legal character and render it a contract instead of a receipt for money. The writing has no greater legal effect in consequence of that stipulation. It is the receipt of the money in satisfaction of the claim which operates to extinguish the claim. The writing itself has no force as a contract of release. It is only as evidence of the fact of receiving the money in satisfaction of the claim that the writing is of any force whatever. And in that view it is not conclusive. It may be shown that no money was in fact received, or a less sum, or that it was not received in full satisfaction, or only upon condition. These propositions are all abundantly shown by the decided cases. The rule has been repeatedly recognized in this State; *Larned v. Belows*, 8 Vt. 79.

It would be wonderful then, we think, if the defendant could not add to the contract expressed in this writing by proving another distinct stipulation and just what was agreed by both parties to be left out of it, and still to be binding, and this on the ground of the legal presumption that a contemporaneous writing upon the subject includes all the contract made by the parties at that time.

If this cannot be done in the mode proposed, it seems to us the party is altogether remediless. For it cannot be claimed that a court of equity could afford relief here on the ground that there was a mistake or fraud in the writing. For there is no ground to allege either. The contract is just as both parties expected, and a court of equity could scarcely afford relief, unless they established the contract in a form different from the agreement of the parties, or else admitted that portion of contract left in parol, which is no more admissible in equity than at law, the rule as to explaining writings by parol being the same in both courts.

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We think this case is controlled by the principle established in the case of *Giddings v. Munroe*, 4 Vt. 308, and in *Fuller v. Crittenden*, 9 Conn. 401, and in *White v. Miller*, 22 Vt. 380, and the cases there cited. And the case of *Harwood v. Harwood's Estate*, 22 Vt. 507, is this very case, as far as one case can ever be identical with another.

The case of *McGregor v. Bugbee*, 15 Vt. 734, is the case of a receipt containing a distinct and extended contract, embracing a great variety of terms and conditions, many of which were still executory. In a case of that character the written contract is none the less conclusive, as we have already intimated, because it begins in the form of a receipt. It is a contract, and not a receipt merely. The case cited from 11 Eng. C. Law Reports, is one involving questions under the statute of frauds, and is not analogous, in any important particulars, to the present, as it seems to us.

Judgment reversed and cause remanded.

UZ CAMERON v. THE TOWN OF WALDEN.*Constable. Towns.*

In order to enable a constable to recover against his town upon an agreement made under the provisions of sec. 66 of chap. 15, of the Comp. Stat., p. 120,* the breach alleged being the neglect of the town to give the plaintiff the collection of certain taxes, the declaration must fully and explicitly set forth a contract duly made by the town with the plaintiff to give him the collection of such taxes.

The declaration in this case adjudged insufficient in this respect.

The declaration in this case was as follows :

"In a plea of the case for that said town of Walden have for a long time, to wit : for the space of twenty years now last past

* Which is as follows :—"The inhabitants of any town shall have liberty to agree with some suitable person to fill the office of first constable, in such method as they shall judge most advantageous, and such person shall afterwards be chosen by the town."

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before the bringing of this suit, been in the constant practice of electing each year at their annual March meeting, a constable and collector of taxes, and of paying to the collector two per cent. on all moneys collected on the town and town school taxes in said town, and of permitting the said collector to retain in his hands the five per cent. abatements on the state and county taxes without accounting to the town for the same, which was well understood between the town and the collector of taxes, for more than twenty years last past. And the plaintiff further says that at the annual March meeting, legally warned, and holden in said town in the month of March, 1856, said town duly elected Abel Amsden as first constable and collector of said town, and the said Amsden then and there entered upon the duties of his office, and continued to exercise and enjoy the same for a long time, to wit: until the first day of December, 1856, when he removed from said town of Walden, and resigned his office of first constable and collector as aforesaid. That said Amsden, as such constable and collector as aforesaid, while he held the office of collector as aforesaid, to wit: on the first day of June, 1856, received from the town of Walden a town tax bill for collection against the inhabitants of Walden and others liable to pay taxes in said town, amounting to a large sum, to wit: the sum of twenty-six hundred and seventy-three dollars and seventy cents:

That when said Amsden resigned as aforesaid, he returned said tax bill to the town of Walden, who then and there accepted and received the same: that there was then a large sum due on said tax bills from those liable to pay taxes on the same, to wit: the sum of five hundred dollars.

The plaintiff further says that the Legislature of the State of Vermont, at the annual session at Montpelier in 1856, voted a tax of fourteen cents on the dollar on the grand list of the State of Vermont, which would raise in the town of Walden a large sum of money, to wit: the sum of four hundred dollars, the collecting fee on which sum, at two per cent. and the abatements at five per cent. would amount to a large sum, to wit: the sum of twenty-eight dollars. And the legislature, at the same session, voted a tax of twenty-five cents on the dollar on the grand list of the county of Caledonia, which would raise a tax on the town of

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Walden amounting to a large sum, to wit: the sum of six hundred and sixty-eight dollars and forty-two cents, the collecting fee and abatements on which would amount to a large sum, to wit: the sum of seventy-three dollars: that said town of Walden afterwards, to wit: on the 20th day of December, 1856, held a legal meeting for the purpose of electing a first constable and collector of said town of Walden to fill the vacancy aforesaid, at which meeting said town, according to the statute in such case made and provided, set up the office of constable and collector to the lowest bidder for the same. And the plaintiff avers that it was then and there stated and understood by and between said town and the plaintiff, and the others present who bid for said office, that the person bidding off said office should have the State and county tax to collect, and should have the seven per cent. allowed by the State and county for collecting the same, and this was held out by the town to induce competition for said office.

And the plaintiff says that he, relying on said promise and agreement of said town, did then and there bid that he would accept said office of constable and collector as aforesaid, and collect the balance of said tax so returned by said Amsden as aforesaid, for the sum of two dollars; and would accept said office of constable and collector if the town would give him the commission or percentage and abatements on the State and county tax aforesaid, and the town of Walden then and there, according to the statute in such case made and provided, did then and there elect the plaintiff constable and collector for said town, which office was accepted by the plaintiff who entered upon the duties of the same.

And the plaintiff avers that by the statute of the State it became and was the duty of the town of Walden, by the selectmen, on or before the 1st day of January, 1857, to have made out the several rate bills of the State tax and county tax aforesaid, and annexed proper warrants to the same, and to have delivered the same, so made out as aforesaid to the plaintiff on or before the day aforesaid, to levy and collect. Yet though often requested, the defendant by the selectmen, did not nor would on the 1st day of January, 1857, or at any other time,

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deliver to the plaintiff the rate bills or taxes aforesaid, or either of them, but ever since have and still do refuse so to do. Whereby the plaintiff hath wholly lost great gains and profits which he otherwise could and would have made from the percentage, commissions, abatements and fees which would have accrued to him from the collection of said taxes, to wit: the sum of eighty dollars. And the plaintiff avers that he has always been ready and willing, and there and then offered to said town, to take and accept said rate bills and to collect the same, which the defendants then and there refused to deliver to the plaintiff."

The second count was substantially the same as the first with the exception that it set forth that the defendants, for the term of more than *fifteen years before the twentieth day of December, 1856*, had been in the practice of electing a constable, etc., and concluding with the averment that it was the duty of the town of Walden, by the selectmen, *in a reasonable time* to make out rate bills, etc.

To this declaration the defendant demurred generally. The county court, at the December Term, 1858, POLAND, J., presiding,—adjudged the declaration insufficient, to which the plaintiff excepted.

J. A. Wing, for the plaintiff, cited *Rumford v. Wood*, 13 Mass. 193; *Parsons v. Goshen*, 11 Pick. 396; *Stetson v. Kempton*, 13 Mass. 272; *Norton v. Mansfield* 16 Mass. 48; *Drew v. Davis et al.*, 10 Vt. 506; *Briggs et al. v. Whipple*, 6 Vt. 95.

Bliss N. Davis, for the defendants, cited *Russell et al. v. Inhabitants of Devon*, 2 Term 308; *Mower v. Inhabitants of Leicester*, 9 Mass. 247; *Ridell v. Proprietors, etc.*, 7 Mass. 169; 14 Mass. 216; 7 Mass. 462; 4 Pick. 414.

PIERPOINT, J. The question arises in this case on a demurrer to the plaintiff's declaration. The plaintiff seeks to recover the damages he claims to have sustained in consequence of the neglect or refusal of the selectmen of the defendant town, to make out and deliver to him the rate bills of the State and county tax, to be collected of the inhabitants of said town, during a period

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when he was acting as the constable of said town, and by law the collector of the State and other taxes.

On examining the declaration, it is not perfectly obvious on what ground the pleader intended to base his right of recovery, whether it is that the defendants and himself had entered into an agreement in pursuance of the provisions of the 66th section of the 15th chapter of the Compiled Statutes, which agreement the defendants had violated to his damage, or upon the ground that having elected him constable, and thereby made him the collector of taxes, the selectmen had neglected to deliver to him the tax bills, as they are required by law to do, whereby he lost the profits to be derived from the collection of the same.

But regarding it in either aspect, we think the facts alleged are not sufficient to entitle the plaintiff to recover. It does not appear from the declaration that any contract was entered into between the plaintiff and the defendant, by which the town became obligated to give him the collection of any particular taxes, or amount of taxes. It might well have been understood that the person who should take the office of constable should have the State and county tax to collect, if any was collected during the time he was in office, as the law makes him the collector, and no other person could collect them, but to obligate the town to give him the collection of any particular amount of taxes, or of any particular tax, so as to make them liable in case of failure, would require a contract to that effect, explicit in its terms, and sanctioned by the inhabitants in town meeting assembled, or made by some person having express authority from the town to bind them in that respect. No such contract is set forth in the declaration. The most that can be claimed on a liberal construction of the facts alleged is that they amount to an understanding between the parties, as to the amount of the plaintiff's compensation for the collection of such taxes as he should collect during the time he was in office. And this would seem to be the only contract which the statute intended to give the town authority to make with their constable. At all events we are quite clear that to bind the town to the extent claimed in this case, requires a contract of the most clear and explicit kind to that effect, and made by some one having full authority so to do.

Cameron v. Town of Walden.

It does not appear that anything was said to the plaintiff on the subject by any one having authority from the town to make such a contract. The moderator of the meeting could have no such authority. The right of the plaintiff to collect all taxes that were to be collected during his term of office could not depend upon any such contract with the town, and it can hardly be supposed that the parties would make or rely on such a contract when the statute expressly gives that right to the person elected constable.

It is equally clear that the plaintiff is not entitled to recover in consequence of the neglect of the selectmen to make out and deliver to him the rate bills so as to enable him to collect the taxes, and thereby earn the specified compensation. Indeed it is not claimed in argument that the plaintiff is entitled to recover on this ground.

The result is the judgment of the county court, sustaining the demurrer, is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
AT THE
GENERAL TERM,
HELD AT
MONTPELIER, NOVEMBER, 1859.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE,	
HON. MILO L. BENNETT,	} ASSISTANT JUDGES.
HON. LUKE P. POLAND,	
HON. ASA O. ALDIS,	
HON. JOHN PIERPOINT,	
HON. JAMES BARRETT,	

In re MERRILL BINGHAM.

*Power of probate courts to enforce their decrees by imprisonment.
Habeas corpus. Executors and administrators.*

The probate court has no authority, for the purpose of enforcing a final decree for the mere payment of money, to imprison the party against whom such decree has been made, and an administrator so imprisoned is entitled to be discharged on *habeas corpus*.

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It seems, however, that the probate court may enforce by imprisonment its interlocutory decrees in proceedings pending before it, which are necessary to bring such proceedings to a final decree; and also may in that way enforce against its appointees such final *specific* decrees as require the delivery by them to others of specific articles of property, or even specific money, held by them merely as depositaries.

- But a decree against an administrator, who has been discharged and has settled his account, to pay over to his successor the balance of money found due from him to the intestate, such money having been received by him for the sale of the personal and the use of the real estate of the intestate, is not such a specific decree as can be enforced by the probate court by imprisonment.

HABEAS CORPUS addressed to the sheriff of Addison county, who made return that he held the relator in custody in the common jail of that county, by virtue of a warrant signed by Hon. Calvin Tilden, judge of probate for the district of Addison. This warrant set forth that previous to the 1st of January, 1857, the relator and Alonzo L. Bingham were appointed by the probate court for the district of Addison, administrators of the estate of Reuben P. Bingham, deceased; that on the 8th of May, 1858, they were by said court duly removed from such office of administrators, and that Jacob W. Conroe was duly appointed administrator *de bonis non* of said estate; that the relator and his co-administrator on the 4th of January, 1859, settled their account, as such administrators, before the probate court, from which settlement it appeared that there was then remaining in their hands the sum of two thousand, five hundred and sixty-eight dollars and ninety-one cents, belonging to said estate, and that the probate court thereupon decreed that they deliver and pay over to said Conroe, as administrator *de bonis non*, the said sum upon demand; that on the 14th of March, 1859, said Conroe showed to said probate court that notwithstanding he had demanded said sum of the relator and Alonzo L. Bingham, they had neglected to pay the same to him, and he therefore prayed for a warrant for their arrest and imprisonment until they should comply with such decree; that thereupon the probate court issued a citation to the relator and said Alonzo to appear before that court on the 26th of March, 1859, to show cause why a warrant for their imprisonment should not issue against them according

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to such petition ; that this citation was duly served upon them, and that at the appointed time they appeared before the court, and a full hearing was had upon such petition and it was made to appear that the statements therein contained were true ; that the relator and the said Alonzo L. Bingham declined to answer any questions before said court in regard to the subject matter of such petition except through their counsel, and that thereupon the probate court adjudged that the relator and said Alonzo had unjustifiably and improperly neglected and refused to comply with the order of said court above mentioned, and had not shown any cause why a warrant should not issue for their imprisonment until they should comply with such order, and that such a warrant ought to issue. The warrant then proceeded to direct the respondent to apprehend the relator and said Alonzo, and commit them until they should pay the said sum, or be otherwise discharged according to law.

It further appeared from an affidavit of the judge of probate, that the balance so found in the hands of the relator and Alonzo L. Bingham, and which they were ordered to pay over to the administrator *de bonis non*, was arrived at in the settlement of their account by charging them with the amount received by them for the sale of the personal property belonging to the estate, and also with the use of the real estate from the death of the intestate to the time of the settlement of their account, and deducting from this aggregate their expenditures as administrators.

It also appeared that a suit was pending upon the bond given by the relator and his associate administrator, the breach assigned being the neglect to pay over to the administrator *de bonis non*, the balance in their hands belonging to the estate.

Linsley & Prout, J. W. Stewart and T. P. Redfield, for the relator.

1. The probate court is a court of limited jurisdiction, and no where is the authority conferred upon it to issue process in the nature of final execution to compel the payment of a claim.

Sections 12 and 13, p. 322, Comp. Stat., were only intended to give the court authority to enforce its rules and orders, and

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to punish a disturbance of its proceedings; *contempts*, as such.

This is the construction of these sections when considered in connection with the act creating the system. Section 12 provides that the process of the court shall be in conformity to the *rules of law*. Section 13 is subject to this limitation, and has no application to all orders the probate court may make in the settlement of an estate.

The neglect or refusal of the relator complained of, was not a contempt. No act was committed in the presence of the court, and while it was in the exercise of its public functions, which is indispensable in the commission of the offence, especially in reference to inferior magistrates or courts of limited jurisdiction.

The statute, Comp. Stat. 375, sec. 2, gives an ample remedy for the neglect complained of, by an action on the administrator's bond, in favor of all interested in the estate, and also provides that it shall be prosecuted according to the rules of law, on *breaches assigned*. In this action the defendant may plead any defence existing, and take issue to the country. The summary mode of proceeding, adopted in this case, deprives the relator of these rights which are guaranteed to every citizen.

A similar provision to those sections of the statute, on which the power of imprisonment by the probate court is claimed to rest, is found in Slade's Comp. p. 333, sec. 4. This act was passed in 1821, but not an instance is known where the attempt has been made to give it the application and effect claimed in this case. The universal practical construction of that act, as well as of the sections of the Comp. Stat. in question, is opposed to the construction now claimed.

2. We insist that the probate court has no power to enforce by imprisonment an order like the one in question in this case.

The balance found due from the relator to the estate was not property in *specie* belonging to the estate, but merely a *debt* secured by and merged in the bond; Hill on Trustees pp. 777-8; 3 Paige 38; 11 Paige 603.

If the probate court ever had the power claimed in this case, it has been modified by the general law prohibiting imprisonment; Comp. Stat. 251, sec. 67; *Blunt v. Page*, 11 Paige 603.

By the Comp. Stat., 242, sec. 2, writs are authorized to be

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issued against the body, and by sec. 75, p. 216, the same powers are given to the court of chancery that are claimed for the probate court in this case, but these provisions, providing for arrest and commitment, are subject to the general law relating to imprisonment; *Cannon et al. v. Norton*, 16 Vt. 364; 16 Vesey 376.

L. E. Chittenden and *Edward J. Phelps*, for the respondent.

I. In connection with the settlement of the estates of deceased persons, the jurisdiction of the probate court is exclusive and comprehensive. Having the power to make all necessary orders and decrees in regard to the subject matter of its jurisdiction, the power to compel their performance necessarily follows; and this power the statute expressly provides may be exercised by a warrant for the imprisonment of the party refusing to perform them; Comp. Stat. chap. 47, secs. 12 and 13, p. 322.

II. The order of the probate court to the relator was strictly within its jurisdiction. The effect of the order was not simply to create a debt from the relator and his co-administrator to the estate, but it was a decree for the performance of a specific act, the performance of which can be enforced, if necessary, by imprisonment.

The relation of an administrator to the estate is strictly that of a trustee. He is in no sense a debtor to it. Hence the jurisdiction of the English courts of equity over the settlement of administrator's accounts; Story's Equity Jur. sec. 532.

He cannot become a purchaser of the estate even by paying a full price for it: *Green, Admr. v. Sargent*, 23 Vt. 466; and this for the reason that he cannot contract with himself, as he must do, to turn himself into a debtor to the estate.

In contemplation of law, the property of the estate in the hands of an administrator is always several and distinct. He has no right to commingle it with his own, nor to do any act to destroy its identity. He has no right to use it as his own, and there is no method known to the law by which he can change his duties and liabilities from those of a trustee to those of a mere contract debtor; *Brown, J., in Seaman v. Duryea*, 10 Barbour 533; *Id.* 1 Kernan 330.

III. The proper proceedings have been taken to enforce this

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order. The provisions of the statute, Compiled Statutes, secs. 12 and 13, page 322, have been followed. The warrant for the imprisonment of the relator, under the statute, could properly issue as soon as the court were informed of his neglect to comply with their order. It is not necessary in such cases to proceed by way of an attachment for contempt, as in a court of equity.

But even if it were otherwise, the practice of the court of equity in cases of contempt has been followed. The relator was duly notified of the motion for an attachment, and was summoned to appear and show cause why such motion should not be granted. He persisted in refusing to comply with the order, and declined to answer any questions by the court except through his counsel.

IV. But it is claimed that the probate court have no power to enforce by imprisonment the performance of a final order for the payment of money. To this we have several answers.

1. The language of the statute will admit of no such limitation. It is as comprehensive as words can make it. It applies to "*any* order or decree of the probate court." To engraft upon it this exception, and make it read "*any* order except a *final* order," destroys its whole spirit and intention.

2. Such a construction is a legal absurdity. It is as if the court should say, we admit the existence of this power so long as its exercise is wholly ineffective, but the moment it is made to serve any useful purpose we deny it.

3. There is a far greater necessity for its application to final than to interlocutory decrees.

4. No statute is necessary to enable the probate court to punish in the ordinary case of a contempt for its authority committed in its presence. This is a power incident to every court; *In re Cooper*, ante p.

But this is not a *final* order in any legal signification of the term. It is made during the progress of, and to facilitate, the settlement of the estate. It is no more final than an order upon the administrator to appropriate a certain portion of the estate to the support of the widow and minor children.

V. This proceeding is not within the non-imprisonment act which only applies to actions founded on contract, and executions issued upon judgments recovered in such actions. This warrant

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is not a *mesne* process, nor is it in any sense an execution issued on a judgment recovered in an action founded on contract. It is a proceeding to compel trustees to deliver over trust property to the party entitled to receive it after the right of the trustees to retain it has terminated; *Seaman v. Duryea*, 10 Barbour 533; 1 Kernan 330.

REDFIELD, Ch. J. This case involves the right of the judges of probate in the several districts in the State, under the provisions of the statutes, to enforce their final decrees on the accounts of executors and administrators by process of contempt. The terms of the statute are very broad; Ch. 47, secs. 12 and 13.

"Probate courts may issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses, or to carry into effect any order, sentence or decree of such courts, or the powers granted them by law."

"If any person shall neglect or refuse to perform any sentence, order or decree of a probate court, such court may issue a warrant directed to any sheriff or constable in this State, requiring him to apprehend and imprison such person in the common jail of the county, until he shall perform such order, sentence or decree, or be delivered by due course of law."

The thirteenth section above, which is chiefly relied upon as the basis of the proceedings against the relator, is found almost in the same words, in the revision of the statutes in 1797. The twelfth section was first adopted by the revision of the probate act in 1821, by Mr. Everett, and is nothing more than an amplification of the provision already existing under the revision of Nathaniel Chipman, in 1797.

It is noticeable that the two sections together seem to define a course of proceeding very analogous to that in courts of equity. We think it could scarcely be claimed with any show of reason, that the legislature ever intended to give the probate courts any more summary powers in enforcing their decrees than those which pertained to the court of chancery. The probability is, we think, from the phraseology used, both in the revision of 1797 and of 1821, that the statute was intended to confer upon the probate

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courts the same powers which belonged to courts of equity, in enforcing their interlocutory decrees, in regard to all pending proceedings in that court, so as to enable them to bring them to a final determination or decree. And we should not be inclined to question that it might have been the purpose of this statute to enable the probate courts to require specific acts to be done by their officers and appointees, for the furtherance of justice and equity, and the due administration of the law, in regard to matters pending in that court. This would certainly be a most convenient and reasonable power to be exercised by that court. We are aware that some of the Massachusetts cases seem to indicate that the probate court cannot enforce a specific decree, requiring an administrator to inventory goods as belonging to an estate; *Boston v. Boylston*, 4 Mass. 318, and that the more appropriate remedy is a suit upon the administrator's bond. But this case admits that the probate court may charge such administrator with the goods in his final account, which amounts to the same thing in another form. And other cases in that State, upon the analogous subject of guardianship, seem to hold that the proper remedy is in the probate court; *Conant v. Kendall*, 21 Pick. 30; *Brooks v. Brooks*, 11 Cush. 18; and deny all redress in the courts of chancery, or by direct action in the common law courts.

This court would still incline to the opinion that the probate court might require specific acts to be done by its officers and appointees, and might enforce such decrees by process of contempt under the sections alluded to. And we are aware that the phraseology of the thirteenth section is broad enough to extend to all the final decrees for the payment of money made by the probate court.

But we should feel very reluctant to suppose the legislature purposed to give such extraordinary powers to the probate courts, unless that is obviously the only rational construction which the statute will bear. We say this because it is obvious that no such powers were ever conferred upon any other court in the State, in enforcing its decrees or judgments. At the very session at which this provision was first adopted, and as part of the same revision, a provision is made in regard to the court of chancery, "That when any decree shall finally be made, a writ of execution

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may issue in the same form, and shall in all things have the same effect as writs of execution on judgments at law." As part of this same system of laws, it was in another chapter provided, at the same session (March, 1797,) when all these provisions were originated, that poor debtors should in all cases where the judgments were upon matters of contract, be entitled to the liberties of the prison upon giving bonds, and be discharged upon the surrender of all their property. In *Cannon v. Norton*, 16 Vt. 334, it was decided that debtors committed upon executions out of the court of chancery were entitled to the benefits of the statutes provided for poor debtors, with all their subsequent meliorations and exemptions. We think it would be impossible to conjecture any sufficient reason why the legislature should have invented, at the same time, and as part of the same system, a process for enforcing obedience to the decrees of the probate court so much more stringent and arbitrary than they were willing to confide to the court of chancery, whose jurisdiction was at that time exercised directly and exclusively by the supreme court. It would be impossible to suppose there could have been any such purpose at the time. The difference in the provisions, in regard to execution of their final decrees, between the probate court and the court of chancery, in this revision, is significant, as it seems to us, of what has been the practical construction of these provisions ever since, a period of nearly sixty years, viz : that the probate courts were left, and intended to be left, without the power of enforcing their final pecuniary decrees, which were in the nature of judgments merely, by process of execution.

And it is certainly not a little remarkable that if this statute was intended to confer upon the probate courts the power to enforce their judgments for the payment of money, by process of contempt, from which there was no appeal and no escape, it should never have been resorted to in all this long lapse of time ; that no contemporary jurist should ever have put the thing in practice, or alluded to its existence in such a form as to keep alive the tradition of such a power in that court, and thus have left the present generation without any knowledge of the existence of any such provision, except as it is to be inferred from

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the terms of the statute. In a matter of this kind, which would have been so sure to be kept in use when once put in operation, we think the entire silence of tradition upon the subject is too significant to be readily answered.

It may be said there has been very little use of the sections referred to, in any form, and they must mean something. That may be true, but if the statute had been understood to mean what is now claimed, it would have proved so effective a remedy that it would not have been permitted to slumber, in all reasonable probability, for a single year. There are various grounds upon which, if this enactment were entirely new, and now for the first time to receive a practical construction, it might be argued that the general provisions of this statute should, or might fairly, be extended to the final decrees of the probate court upon the accounts of executors and administrators. The office of executor or administrator is fiduciary, and one of strict trust. There is, therefore, more propriety in requiring a strict accountability than in ordinary cases of simple indebtedness, in the way of contract. But it will also be remembered that the final decrees of the court of chancery are often in matters of trust, and may require this stringency of remedy, as much as, or more than, cases of this character. And although it may be true that the remedy in the court of chancery, by process of contempt, is not expressly taken away by the statute, it must, nevertheless, be conceded that it is so in effect. It would be very unreasonable to suppose that the legislature intended to leave that still in force. That is the view taken of a similar statute in New York; *Wegel v. Wegel*, 3 Paige 38. And it is well known that in commitments out of chancery for the non-payment of money, the prisoners have been held entitled to the benefits of the insolvent laws, in England, even; *Rex v. Stokes*, Cowp. 136; *Rex v. Peeterill*, 4 Term 809; *Rex v. Davis*, 1 B. & P. 336. But in *Rex v. Hubbard*, 10 East 408, it was held that one under imprisonment from an attachment for not paying the amount of an award, made a rule of court, was not entitled to the benefits of the Lords' Act, 48 GEO III, ch. 128, because that act is confined, in terms, to persons in execution *on any judgment*. There would be the same difficulty in

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giving the relator the benefit of the poor debtors' act, if this commitment were to be held valid. For this *warrant* is not an *execution* upon any judgment.

But it has been said in argument that this is really a case of specific trust, where the moneys should have been in the hands of the relator, and may therefore be presumed to be so. We are not inclined to question the right of a court of equity, in a case precisely of that character, to enforce a decree for specific performance by process of contempt. That would apply to cases where the defendant had in his possession family memorials, such as pictures and busts, and other mementoes, whose chief value consisted in their relation to the orator, and very likely to a case where the defendant had specific money, in stocks, or in a parcel, which he had no right to use, but of which he was the mere depositary. And it would seem that the probate court might fairly be regarded as possessing some such power in the disposition of estates, under these statutory provisions, as we accord to the court of chancery.

But we do not regard this case as one of that class. For if we concede that it is competent for the probate court to require the outgoing administrator to surrender to the administrator *de bonis non* such specific goods as remain in his hands unadministered upon, it is obvious that it will fall far short of the present case, as it appears upon the face of the papers. This is a final account of the former administrators, of their whole administration. Instead of any attempt to charge them with any specific goods in their hands undisposed of, with a view to giving them over into the hands of the present administrator, the former administrators are charged with the entire inventory of the estate, as the basis of their account. This at once vests the absolute title of the goods in them, as having been in fact converted by them into money, or which, from the time elapsed, should have been so converted. The decree proceeds then upon the basis that the relator and his co-administrator are liable for so much money which they have received, or ought to have received, from the sale of the personal and the use of the real estate of the intestate.

Now it is in vain to attempt to refine upon this state of facts, and to make it anything but a debt, a mere money debt, and

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nothing more. There was no specific money in the hands of the relator or his associate which could be traced as the specific money of the estate. The money, when paid, became the money of the administrators. There is no ground to claim that there was any such duty to keep the money separate, as would render them liable to an action of trover for the use of it, or to an indictment for embezzlement on account of any use to which they might put it.

The decree of the court of probate then is one for money due, and for that only, and is strictly a debt and nothing more. And we are satisfied there is no ground to consider that there was any power in the probate court to commit the relator for not paying the amount found due upon his administration account.

We think the case is the same in principle as a decree of distribution among creditors, or heirs, or legatees. The obligation is no different because the relator was ordered to pay to the new administrator from what it would be in any case where the executor or administrator is decreed to pay the balance of his account to creditors, or heirs, which is the usual and proper mode of making a final decree upon such accounts.

We have said all which is important, perhaps, to show that the relator is entitled to his discharge. If the probate court had no jurisdiction to issue any such process for the purpose for which this issued, it will not be claimed that the fact that the relator refused to answer questions, or did not take an appeal, will make any difference. The decree had already merged all the preceding items of account in a mere money debt. There was, therefore, no occasion for any further examination in regard to it. The probate court had no further power to enforce it. The appeal must then be to the courts of law in an action, either upon the bond, or of debt, upon the decree perhaps, if that were preferable. And the relator not taking an appeal from this unlawful proceeding no more gives it any validity as against him than if it had been a specific sentence of corporal punishment. The whole proceeding is irregular and void.

We are aware that our views are different from the decisions of the New York courts in *Seaman v. Duryea*, 10 Barbour 533; S. C. 1 Kernan 327. But we regard that case as based upon

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views somewhat artificial, and which we believe would not have been so prevalent with any court had the question arisen between other parties. To argue that the power in the probate court to compel an administrator to render his account, implies the power to compel the payment of the balance found due, and by the same kind of process, on the ground that rendering an account imports *ex vi termini*, the payment of the balance due, is more refined, not to say forced, than can be made altogether satisfactory to the mind, unless when we are attempting to devise some expedient to shield an innocent officer from the relentless pursuit of an incensed party, who has been indeed unjustly restrained of his liberty, but who ought not to show a very severe spirit of retaliation, even for such an error, or mistake of the law, until he is able to pay such honorary debts as the balance of a trust account, which, although it is but a mere debt, in the law, is one of a very honorary character among men, and justly so regarded.

Relator discharged.

SPENCER SMITH AND ELIZA L. SMITH, *his wife*, v. THE SOUTH ROYALTON BANK, HENRY M. BATES and HEMAN CARPENTER.

(IN CHANCERY.)

Deed. Escrow. Principal and agent. Notice. Bank Director.

A deed deposited by the grantor with a third party, to be held by him and not delivered to the grantee until some other thing is done, will have no validity until the performance of such condition, even though the depository in fraud of the grantor, deliver it to the grantee, who takes it in good faith and in ignorance of any condition imposed upon its delivery, and advances a valuable consideration for it.

The recording of such a deed by the consent of the grantor will not render it binding upon him in the case of such a fraudulent delivery of it by the depository to a *bona fide* grantee, if the grantor consented to such recording with

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the express understanding that the depository should still retain the deed after it was recorded until the performance of the condition upon which it was to be delivered.

The orators deposited a mortgage executed by them with R., to be held by him as an *escrow* until a bond of indemnity from P. should be furnished them by T. R. delivered the mortgage to the grantee without T.'s having furnished such a bond, and without the orators' knowledge, the grantee, however, being ignorant of any condition as to its delivery and taking it in good faith and for value; *Held*, that the fact that after the orators became aware of the unauthorized delivery by R. of the mortgage, they expressed to T. a willingness to take, and a desire that he should furnish them, a bond of indemnity from B. in the place of that of P., and also that they neglected for two months after they ascertained that the mortgage had been improperly delivered by R., to notify the holder of it that they claimed it to be invalid, did not amount to a ratification of its delivery by R.

If a director of a bank act in behalf of the bank in a transaction of which the bank takes the benefit, notice at the time, to the director, of any fact material to such transaction, is notice to the bank.

BILL IN CHANCERY. From the bill, answers and testimony, it appeared that in August, 1856, Daniel Tarbell, Jr., then a director in the South Royalton Bank, a corporation organized under the general banking law of 1851, requested the orator, Spencer Smith, to execute to such bank a bond and mortgage of his home farm in Tunbridge to enable the bank, by an assignment of such bond and mortgage to the treasurer of the State, under the provisions of that law, to obtain an increased issue of their registered bills; that Tarbell promised to pay Smith seventy dollars per annum for the use of his farm for that purpose, and also agreed to furnish him a bond from one Pierce, indemnifying him against any loss by reason of the execution of such bond and mortgage; that Smith, in reliance upon this agreement, executed a bond to the South Royalton Bank, in accordance with the provisions of the general banking law, for twenty-four hundred and eighty dollars, payable in 1865, with interest semi-annually, and the orators executed a mortgage of their home farm to secure the payment of this bond; that this bond and mortgage were not delivered by the orators to Tarbell nor to the bank, but it was expressly agreed between Tarbell and the orators that they should not have any effect nor be delivered to any one to be used for any purpose whatever until the indemnifying bond of Pierce

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should be furnished the orators, but that in the mean time they should be held by one Rolfe, to whom they were then handed by the orators. It was, however, at the suggestion of Tarbell and Rolfe, agreed by the orators that, for the sake of expediting the transaction, the mortgage should be recorded in the town clerk's office in Tunbridge, but that after it was so recorded Rolfe should still retain possession of the bond and mortgage, and not deliver them to the bank, nor to any person to be used in any way for banking purposes till the indemnifying bond of Pierce was furnished. Rolfe received the bond and mortgage from the orators with this express agreement, and procured the latter to be recorded. The bond and mortgage were then, without the knowledge of the orators, assigned by the bank to the State treasurer, and were taken by Rolfe, accompanied by Tarbell, to the treasurer's office, where Rolfe delivered them to Tarbell, who, without the orators' knowledge, delivered them to the defendant, Bates, the then State treasurer, and received for them from Bates Virginia stocks and registered bills of the bank to the amount of the bond, which stocks and bills were thereafter used by and for the benefit of the bank.

It appeared that all the officers of the bank except Tarbell, as well as the State treasurer, were entirely unaware of any stipulation on the part of Tarbell to furnish the orators a bond of indemnity, or that the bond and mortgage were handed by the orators to Rolfe with any restriction of his power and authority to deliver them, but that all of the parties except Tarbell and Rolfe acted in perfect good faith in the transaction.

On Tarbell's return from the State treasurer's office he sent seventy dollars to Smith to pay him for the use of his farm for banking purposes for the first year, but Smith refused to accept it until the bond of indemnity should be furnished. The orators were not aware until February, 1857, that their bond and mortgage had been passed into the treasurer's hands. Shortly after they had learned this fact a conversation took place between Spencer Smith and Tarbell, wherein the latter said he thought he could obtain for the orators an indemnifying bond from Chester Baxter, which Smith urged him to do. At the same time Tarbell told Smith to take the seventy dollars which had been lying

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subject to his order at the union store in Tunbridge since the August previous, and said that if a satisfactory indemnifying bond was not furnished within a very short time the money should be regarded merely as a loan from Tarbell to Smith, and upon this understanding the latter consented to receive it.

In April, 1857, the orators notified the State treasurer that the bond and mortgage in question had been fraudulently obtained and used, and that they should resist the payment thereof. This was the first notice that the State treasurer received of any claim of this kind on the part of the orators.

The defendant, Carpenter, in July, 1857, was appointed receiver of the South Royalton Bank by the court of chancery for the purpose of collecting its assets, redeeming its bills and discharging its remaining indebtedness. It appeared that Tarbell was insolvent.

The bill set forth substantially these facts, and prayed for an injunction restraining the South Royalton Bank, the State treasurer and Carpenter, from proceeding in any way to collect the orators' bond and mortgage, and also that they might be decreed to deliver the same up to the orators.

BARRETT, chancellor, upon hearing, made a decree in accordance with the prayer of the bill, from which the defendants appealed.

Wm. Hebard and Lucius B. Peck, for the orators.

1. A deed or other written instrument takes effect *from delivery*, and until the *maker* parts with the possession, and yields up his right to control it, the writing has no legal existence, and no other person can gain any rights under it; *Harrington et al. v. Gage et al.*, 6 Vt. 532; *Fish v. Gordon*, 10 Vt. 288; *Fairbanks v. Metcalf*, 8 Mass. 230; *Stiles v. Brown*, 16 Vt. 563; *Ladd v. Ladd*, 14 Vt. 185; *Fletcher v. Austin et al.*, 11 Vt. 447.

The delivery of a deed is a *question of fact* involving *intention*; *Lindsay v. Lindsay*, 11 Vt. 621; *Roberts v. Jackson*, 1 Wend. 478.

In the case at bar there is no complaint as to the facts. The witnesses all testify in substance that the deed and bond were deposited with Mr. Rolfe, for him to keep till Mr. Tarbell should

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procure the indemnifying bond, with strict instructions not to give it up till the bond was procured, which was never done.

The depositing a deed with a third person for him to keep till the happening of some future event, is not a delivery; *Clark v. Gifford*, 10 Wend. 311.

2. That the orators consented to have the deed put upon record makes no difference so long as the condition remained upon which the delivery depended; *Maynard v. Maynard*, 10 Mass. 456.

The record is only one link in the chain that forms a perfect title to real estate, but the essential one is *delivery*, and if that is wanting it matters not *how many* or *how few* of the others have been supplied.

"Tenth or ten thousandth breaks the chain alike."

3. There is but one principle involved in this case, and that is in relation to the delivery of the deed and bond, and if they were not delivered by the *maker* or by *his consent*, it matters not how they came in circulation nor who is affected by it; *Pawling et al. v. United States*, 4 Cranch 219.

The effect upon third persons would be the same if they were obtained by breaking the grantor's lock as by breaking the confidence of the person with whom they were entrusted.

4. Neither the treasurer nor the bank have any interest in this question, but if they had it would make no difference, for every man, when he receives the paper of another, takes it at his own risk as to its genuineness; *Awde v. Dixon*, 5 Law & Eq. 512; *Maughs v. Dixon*, 18 Law & Eq. 82; *Caskell v. Taylor*, 15 Law & Eq. 101.

5. The consent of the orator to substitute the bond of Mr. Baxter for that of Mr. Pierce, was no delivery of the deed, nor a consent that it might be used, but was an abiding evidence that the deed was not to be used till some bond was furnished.

H. Carpenter and *P. T. Washburn*, for the defendants.

1. The orators base their claim for relief upon the ground that the bond and mortgage was to be held by Rolfe as an *escrow*, not to be used by Rolfe until the bond of Pierce was furnished to Rolfe for their indemnity. The bond and mortgage in controversy were executed in due form, and the orators consented to the

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assignment and recording of the same in the proper office, that they might be ready for use, and they were duly assigned and the mortgage and assignment recorded as the law requires. It is further admitted that after the orator had knowledge that Tarbell and Rolfe had passed said instruments to the treasurer, they made a further agreement to take the bond of Chester Baxter as a substitute for the bond of Pierce, and received the bonus of seventy dollars which Tarbell was to pay them for the use of the farm for banking purposes. Clearly, then, whilst the instruments *remained* in the hands of Rolfe, they were subject to the control of the orators, if the bond of Pierce was not furnished, yet after their agent had used them for the purposes for which they were designed, and, with this knowledge, the orators had made a new contract to take the bond of Baxter, and received the bonus, it is a waiver on their part of the first condition, and in equity an adoption of the act of their agent. Rolfe, the orator's agent, was satisfied to part with the instruments, and did so; *Pratt v. Holmans*, 16 Vt. 530.

2. The South Royalton Bank had no knowledge of the agreement between the orators and Tarbell about the bond of Pierce, and the bond and mortgage in controversy, being all fair on their face, were received by the treasurer in good faith, without notice of any such arrangement as is now claimed, the treasurer parting with their full value, relying upon the genuineness and validity of the instruments in the usual course of business, and the orators in equity and fair dealing are bound by their own acts, and must look to their agent for any misconduct of his. The orators having furnished the *means* by which they are damaged, must bear the loss, instead of those who have acted in good faith relying upon the conduct of the orators as they had a right to do; *Passumpsic Bank v. Goss & Page*, 31 Vt. 315; *Brockway v. Mason*, 29 Vt. 519; *American Leading Cases*, Vol. 1, page 328, and notes and cases there cited.

3. This kind of paper (the bond and mortgage) is created by the statute of 1851, and when executed in conformity to law the treasurer is *bound to receive it*. He has no discretion in the matter except as is pointed out by law. See the general banking law, acts of 1851, sec. 7, 8 and 9.

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4. The orators, having neglected to notify the treasurer for an *unreasonable time* after they had notice that he held the bond and mortgage in controversy, and after all opportunity had passed for him to protect himself and the bill holders, and the creditors of the bank, should be estopped from setting up the illegality of their bond and mortgage.

BENNETT, J. This is a case of very considerable importance, and we have endeavored to give it a careful consideration. We have no doubt, from the testimony, that the bond and mortgage in question in this case were delivered *conditionally* to Rolfe, to be delivered by him to the State treasurer, when the orator, Spencer Smith, should be indemnified from all loss and damage which should be occasioned to him by reason of the same, and not before. No precise form of words is necessary to make an instrument an *escrow*, and an *escrow* has been well defined to be the *conditional delivery* of an obligation or deed, which is to take effect upon the happening of some event consistent with the instrument, and not a condition of delivery repugnant to the contract and varying its terms. It is laid down in our elementary writers, that an *escrow* can never take effect as a deed till the performance of the condition, even though the grantee gets possession of it before such performance; and in *Hinman v. Booth*, 21 Wendell 267, it was held that the condition must be *literally* fulfilled, and that where the condition was that the grantee was to give a bond for the support of a third person, and such bond had not been given, the deed could not take effect, although the support had been in fact furnished such third person during his life, and he had deceased. Until the condition is performed the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk. The delivery is a part of the execution of the instrument, and is essential to its vitality; see 1 Shep. Touchstone 59; 2 Hilliard on Real Property 303, secs. 131 and 132.

It is not in fact seriously contested in this case, but that the bond and mortgage were delivered to Rolfe as *escrows*, and that they were delivered over to the State treasurer by Rolfe without authority, and *in fraud* of the rights of the orators, inas-


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much as Pierce's bond of indemnity had never been procured, and the case is put upon the ground that the State treasurer, under the banking law of 1851, took the bond and mortgage in *good faith* for value paid, and that he has a good right to have them enforced, that the same may become assets of the bank in the hands of the receiver for the benefit of the bill holders of this insolvent institution. We are not disposed to question the fact that the bond and mortgage were received by the treasurer in *good faith* and for value, and that one of the two innocent parties must suffer, and the question now is, which it must be? In the case of an *escrow* the estate does not pass, but remains in the grantor until the condition has been performed and the deed delivered over, and if the deed be delivered over without a performance of the condition, it cannot be an operative delivery to pass the estate. In this case Rolfe was the special agent of the grantors to hold the bond and mortgage till the condition was performed, and no presumption can arise of his having a general agency, if that should be thought to be of any importance. The deed not having been delivered it was a nullity and void, or more properly speaking, *never existed*, and must be tainted with the *fraud* of Rolfe, which goes to the very existence of the instruments, into whosoever hands they may come. It is not like the cases where the *fraud is collateral*, as where the instrument has become a perfect one, and it is appropriated fraudulently to a use different from the one for which it was created. It is then the important question in the case, whether from the facts disclosed there is any good ground to hold that the grantors cannot avail themselves of the want of a delivery of the bond and mortgage?

It is said on the part of the defence that the orators ought to be bound by the delivery of the bond and mortgage by Rolfe, although he has been guilty of a gross fraud and has transcended his authority, because the orators have enabled him to mislead an innocent party, and that the *maxim* of natural justice well applies to this case with its full force, "that he who, though without any intentional fraud, has put it in the power of another person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the loss, rather than the other party who has placed confidence in him."

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Though this position may seem specious, yet we think, as applied to this case, it is not sound. The authority delegated to Rolfe was to do a single act, and his agency was of the *most special kind*, requiring him only to perform a single act, strictly ministerial in its character. Mr. Smith, in his treatise on Mercantile Law, a work of great accuracy, on page 59, 2d edition, after defining a general agent, proceeds to say, "his authority cannot be limited by any private order or direction not known to the party dealing with him. But the rule, he says, is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction, for it is, he adds, the duty of the person dealing with such a one to ascertain the extent of his authority, and if he does not do it he must abide the consequences." So in Paley on Agency by Lloyd, 3d edition, 199, note, after stating the rule applicable to general agents, and the assumptions to be made that they have an unqualified authority to act in all matters within the scope of their agency, it is said, "in the case of a particular agent, that is, one employed specially in that single instance, no such assumption can be reasonably made, and it becomes the duty of the person dealing with him to ascertain by inquiry the nature and extent of his authority, and if it be departed from he must be content to abide the consequences."

This distinction,  says, will explain all the cases in the text. See also Smith's Mer. Law, 3d ed. 107, 108; *Wooden v. Burford*, 2 C. & M. 395; *Jordan v. Norton*, 4 M. & W. 155; *Sykes v. Giles*, 5 M. & W. 645.

Where one of two innocent persons must suffer from the *fraud* of a third person, the inquiry naturally arises, which gave the credit? Smith is not chargeable with holding out Rolfe as possessing larger powers than he in fact had; and the State treasurer, not having ascertained the true extent of his powers, though this may be without any personal fault in him, must, as between Smith and himself, be regarded as having trusted to Rolfe rather than Smith, or in other words, the State treasurer, or rather those in whose behalf he was acting, must sustain the loss occasioned by the *fraud* of Rolfe rather than Smith. If an agent in dealing for his principal, strictly within his authority,

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commits a fraud in the sale of property, the principal must answer for it, unless he chooses to repudiate the fraud and restore the dealer to his former situation. He cannot adopt the dealing and repudiate the fraud. The *maxim* in relation to which of two innocent persons shall suffer from the fraud of a third person, is not to be so extended as to make the principal responsible for the want of the general integrity of his agent, and for his acts attended with fraud which are not included within the power conferred upon him. Such an application of the maxim would break down well settled principles, and would prevent the principal from defending upon the ground that it was the fraud of the agent, even in cases where the agent acted in a matter beyond the extent of his powers. The maxim was first applied by Lord HOLT, in an action for a *deceit* in the sale of some silks by an agent who had authority to make the sale; 1 Salk. 289. In such a case the application of the maxim is well enough, but here Rolfe was a special agent to deliver the deed upon a special condition, and [the fraud consisted in his doing an entire act which he had no authority to do. It might have been better, if the law had required that it should appear upon the face of a deed that it was delivered as an *escrow*, and if such had been the rule grantees might have been more secure against fraud, but as was well said by Ch. J. MARSHALL, "the law is settled otherwise, and it is not to be disturbed by the court;" 4 Cranch 222. The position that an agent with limited powers cannot bind his principal when he transcends his powers, and that the person dealing with him is bound to know the extent of his powers, is too well established to be questioned; 1 Peters 290. The bond and mortgage then was a *nullity* in the hands of the treasurer *for the want of a delivery*, and he cannot escape this consequence by an application to the case of the maxim which is sometimes applied, as between two innocent parties. This is not like the case of *Pratt v. Holman et al.*, 16 Vt. 530. There the deed was delivered to the agent appointed by the grantee to procure it. In such a case the delivery to the agent was effective to pass the title, although it was delivered upon a condition which had not been performed; 1 Selden 238; 8 Mass. 238. In legal effect it was a delivery to the grantee.

Besides, the court in *Pratt v. Holman* put the case upon the

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ground that the agent was satisfied with *the promise to pay the money*, and if not paid, an action might be had on the promise. This was clearly a case where the deed took effect from the time it was delivered to the agent.

The case at bar is one that does not fall within the *law merchant* as to negotiable paper. The general rule of the common law is that an assignee takes a chose in action, subject to all the equities that existed between the original parties. In the case of *The Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 Kernan 599, the plaintiffs were *bona fide* holders of the certificates of stock for value advanced at the time, and Schuyler was, at the time the certificates were issued, president of the company, and also *transfer agent*, whose business it was, on the transfer of stock on the books in his charge, and the surrender of certificates, to issue new certificates of stock to the transferee, and the certificates in that case issued to Kyle were in the usual form, and were duly transferred by Kyle to the plaintiffs. Kyle and the transfer agent of the company were both parties to the *fraud*, and yet it was held that the railroad company could not be made liable to the bank on the ground that Schuyler was their transfer agent. The certificates not being commercial paper, the ordinary rule was applied. See also *Grant v. Norway*, 70 Com. Law 665; *Coleman v. Riches*, 29 Eng. Law & Equity 323; *The Schooner Freeman v. Buckingham et al.*, 18 Howard U. S. 182.

The case of *The Farmers & Mechanics' Bank v. The Butchers & Drovers' Bank*, 2 Smith (N. Y.) 125, where the *paying teller* had certified a bank check *to be good*, in violation of his duty, the drawer having no funds in bank, was decided purely upon the ground that a bank check was *negotiable paper*, and governed by the law merchant.

We think the orators are not precluded from urging in their defence a want of authority in Rolfe to deliver the bond and deed, by reason of their holding him out as having such authority.

The only pretence for this arises from the naked fact that the orators consented that the assignment might be made upon the papers, and the deed put on record, while Rolfe held them as *escrows*. This, it seems, was done simply to expedite the business. In *Maynard v. Maynard*, 10 Mass. 456, it was well held that the grant-

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or's putting a deed upon record did not constitute a delivery of the deed to the grantee. No title could pass out of the grantors of course by the force of its being recorded, but still the question remains, what shall be the effect of putting such apparent title on record, so far as the rights of the treasurer are concerned, who acts as a trustee? Tarbell, who negotiated with the mortgagors for this mortgage to the bank, was at the time one of the directors in the bank, and was a party to the transaction, and privy to the condition upon which the papers were put into Rolfe's hands, and the object of having the deed put on record while in the hands of Rolfe. Notice of these facts to Tarbell, a director, in the very transaction itself, was notice to the bank.

The mortgagors should not in this case be *estopped* from insisting upon a want of the delivery of the deed by reason of the record. To hold this would only be asserting in another form, that *fraud*, where the act is one of pretended agency, is no defence. It would subvert the settled doctrine that the assignee takes subject to all equities between the original parties. Besides, the putting the deed upon record was not by implication a representation of any other fact, and not designed to influence the treasurer to accept the deed without any valid delivery, but it was consented to to facilitate the completion of the whole business. No question can be had but what the bond and deed were a *nullity* in the hands of the bank, and both Tarbell and Rolfe were guilty of a gross fraud in passing them off to the treasurer. The bond and the mortgage then being, as between the orators and the bank, of no more force than so much blank paper, and utterly *void*, they are incapable of confirmation, so as to confer a title to the assignee of the bank. It is no doubt true that there is a radical distinction, as it respects the rights of a *bona fide* purchaser or assignee without notice, between a *void* and a *voidable* instrument. If, for instance, a voluntary and covinous deed of lands is made to a grantee, and he conveys to a *bona fide* purchaser without notice, the purchaser shall be preferred to the creditors of the fraudulent grantor. In such a case the deed is valid as between the parties, and *voidable* only by the creditors of the vendor. It may be conceded as a sound principle of law that in cases of *voidable deeds* and *obligations* the *bona fide* assignee

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or purchaser stands in a better situation than the participant in the fraud, but not so if the instrument was *void*. In the case of *Martin v. Miller*, 4 Term 320, it was held that an unauthorized alteration in a bill of exchange, after acceptance, by which the time of payment was shortened, avoided the instrument, and that no action could afterwards be maintained on it, even by an innocent holder for value. The case of *Awde v. Dixon*, 5 Eng. Law & Equity 512, seems by the court to be put upon the ground that the note never became a perfect instrument, as against the defendant, inasmuch as there was no authority, express or implied, from him for a delivery of the note.

But let the principle be as it may in regard to commercial papers, no question can be made as to a *void deed*. The case of *Van Armage v. Miller*, 4 Wharton 382, is ruled expressly on the distinction between a *void* and a *voidable* deed, and it was there held that a *bona fide* purchaser for a valuable consideration from the person holding a void deed stands in no better situation than such fraudulent holder. The distinction is fully recognized in *Price v. Yunkin*, 4 Watts 85, and the case decided upon that distinction. So in *Arrison v. Harnstead*, 2 Barr 191, 195, it was held that a deed having been rendered void by an alteration, a purchaser without notice and for valuable consideration was in no better situation than the original parties. The case in the 4 Wharton, as in the case at bar, was one where there had been no valid delivery of the deed. So in the case of *Pawling v. United States*, 4 Cranch 219, there had been no delivery of the deed. It hardly need be remarked that if a deed wants delivery, it is *void ab initio*.

Where a *bona fide* purchaser for value holds under a vendee, who holds by a *voidable* deed, though he and the creditors of the vendor have equal equities, yet the purchaser has also the legal title and shall be preferred. In the case at bar, though the bill holders of the bank represented by the treasurer and the orators have equal equities, yet as the bond and deed are *void*, the legal title remains in the orators and they should be preferred under the common rule, that where the equities are equal, the one having the legal title prevails.

It becomes necessary to see whether in this case there was a

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subsequent recognition of the delivery of the bond and deed by the orators, or something done by them which enabled Rolfe and Tarbell to deceive the assignee, and should exclude the orators from relief. We think, from the evidence, there is no ground to find the fact that Smith subsequently ratified the delivery of the bond and mortgage. When he found the papers had been fraudulently delivered by Rolfe, he had a right to try to extricate himself from loss. If he had accepted some other security in the place of Pierce's bond, it might have operated as a recognition of the delivery, but his willingness to take other security should have no such operation; and as to the reception of the seventy dollars, which by the contract he was to have for the use of his farm, for putting it in for banking purposes, as it was called, he accepted it, not under the original agreement, but under a new agreement, that it should be treated as money lent unless Tarbell should subsequently indemnify him against the bond and mortgage. The omission of Smith to give earlier notice to the treasurer of his defence cannot be construed into a ratification of the delivery of the papers, and though, if the treasurer had had earlier notice, he might have been enabled to make all things right with the bank, yet that should not throw the loss upon Smith. Both the treasurer and Smith no doubt supposed the bank amply safe, and there was at that time nothing to cause alarm in the minds of either, and no sufficient reason in law or fact is shown why Smith should have been required to give earlier notice to prevent a waiver of his defence to the bond and mortgage.

We think that the treasurer cannot claim to take this case out of the ordinary rule upon the ground that he has been misled as to the extent of the authority of Rolfe, by the act of Smith. The bond and mortgage were, it is true, put into the hands of Rolfe, and by him carried to the treasurer in company with Tarbell, and though Rolfe and Tarbell passed them to the treasurer professedly in behalf of the bank, yet this was in no way the act of Smith, and it does not appear that they exhibited any authority from the bank so to do, and no inquiries were made of Rolfe as to his powers, and not only Rolfe and Tarbell acted in fraud of the rights of Smith, but the bank also are chargeable with participating in the fraud,

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inasmuch as notice to Tarbell, a director in the bank, is to be regarded as notice to the bank, of the terms upon which Rolfe held the possession of the papers. It may be conceded, perhaps, that this is a hard case for the bill holders, but would it not be much harder for the orators if they are to be visited with the fraud of Tarbell, of the bank, and of Rolfe, through whose wrongful conduct claim is made? No doubt fraud may be committed on an innocent purchaser, but had we not better encounter that risk rather than attempt to give effect to a *void deed*, simply on the ground that the grantors should be estopped from contesting it, for the reason that they consented that it might be recorded, before it was delivered, for an honest and laudable purpose. In the ordinary case a deed purports upon its face to be an *absolute deed*, and purports to have been signed, sealed, acknowledged and delivered, yet the law is well settled that it may be shown by parol that it was delivered as an *escrow*, and if it has also been recorded, still it may be shown to be only an *escrow*, and the fact of its having been recorded is of itself no evidence that the person who held the instrument as an *escrow* in his hands after it was recorded, held it with enlarged powers, as to his *agency*, and the principles of law applicable to a case of *special agency* must apply and govern this case.

The decree of the chancellor is affirmed with additional costs.

CHARLES B. BALLARD v. HORACE BOND.*Statute of frauds. Assumpsit.*

The plaintiff and the defendant made a parol contract that the former should convey to the latter a farm for a certain price, and that if the plaintiff could within a year find a purchaser at a higher price, the defendant should convey the farm to such purchaser, and that the plaintiff should have one-half the gain so made. The plaintiff conveyed the farm to the defendant and received payment therefor. Within the specified time he found a purchaser at an advance, but the defendant would not convey to him; *Held*, that the contract was within the statute of frauds, being for the sale of lands, and that the plaintiff could not recover of the defendant for a breach of the

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contract in special assumpsit, nor in general assumpsit for his expenses and labor in finding such a purchaser.

The case of *Hodges et ur. v. Green*, 28 Vt. 358., explained and limited.

ASSUMPSIT. The first count was as follows :

"In a plea of the case for that the said defendant heretofore to wit, at Hartford aforesaid, on the first day of March, 1856, in consideration that the plaintiff would sell to the defendant, at his request, a certain farm situated in Lebanon, in the county of Grafton, and State of New Hampshire, which the said plaintiff had bid off at public auction, at and for the sum of seven hundred and forty-seven dollars and fifty cents, then and there promised and agreed with the said plaintiff that he should have the privilege of selling the said farm at any time within one year from the time of making the said contract or agreement, at and for any sum greater than the said sum of seven hundred and forty-seven dollars and fifty cents, and that the said plaintiff should have one-half of what he should sell the said farm for over and above the said sum of seven hundred and forty-seven dollars and fifty cents, and also in consideration as aforesaid, promised the said plaintiff that he, the said defendant, would deed the said premises and give good title thereto, to whomsoever the said plaintiff should sell the same to within the one year as aforesaid. And the plaintiff avers that he, in consideration of the promises and agreements of the said defendant, as above set forth, and fully relying upon the same, afterwards to wit, on the same day, at Hartford aforesaid, did sell the said farm to the said defendant at and for the sum and price of seven hundred and forty-seven dollars and fifty cents, and caused a good and sufficient title to the same to be given to the said defendant ; and also relying upon the said promises and undertakings of the said defendant as aforesaid, he, the said plaintiff, afterwards, to wit, on the first day of October, 1856, and within the year as aforesaid, did bargain and sell the said premises to one L. H. Tolburt, of said Lebanon, at and for the sum and price of eight hundred and seventy-two dollars and fifty cents, it being one hundred and twenty-five dollars in advance, one-half of which, amounting to sixty-two dollars and fifty cents, was the share or profit of the said plaintiff in the said sale, according to the agreements and

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promises of the said defendant, as aforesaid, and which the said plaintiff would have received, of all which the said defendant had notice, and was then and there requested by the said plaintiff to deed the said premises to the said L. H. Tolburt, and give him a title thereto. Yet the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to injure and defraud the plaintiff in this behalf did not, nor would when he was requested as aforesaid, or at any time before or since, deed or give title to the said premises to the said Tolburt, but hath hitherto wholly neglected so to do, contrary to the said promise and undertaking of the said defendant, by reason whereof he, the said plaintiff, hath been deprived of all the benefit and advantage, and all the profit and gain which he would otherwise have made and derived from the said sale to the said Tolburt, and hath also been put to a great expense and trouble, amounting in all to a large sum, to wit, seventy dollars."

The second count contained the common counts for work done, money lent and money had and received.

The defendant filed the following plea :

" And the said defendant says that the plaintiff ought not to have or maintain his action aforesaid against him, because he says that there never was any contract or agreement in writing between said plaintiff and defendant, in relation to said farm, in any way, and that there never was any note or memorandum of any such contract or agreement, in writing, signed by this defendant, or by any other person by him lawfully authorized for that purpose, and that there never was any such contract or agreement in writing between the said parties, as is alleged in said first count in the plaintiff's amended declaration, or any note or memorandum in writing of any such contract or agreement, signed by this defendant or by any person by him lawfully authorized for that purpose.

And the defendant avers that the second count in the plaintiff's amended declaration is for alleged services, disbursements, etc., under and by virtue of the pretended contract, set up in the first count above referred to, and for no other services or pretended claim whatsoever.

And this the said defendant is ready to verify. Wherefore he

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prays judgment, if the plaintiff his action aforesaid against him ought to have or maintain, and for his costs."

To this plea the plaintiff demurred, but the county court, at the December Term, 1858, in Windsor county,—REDFIELD, Ch. J. presiding,—adjudged the plea sufficient and rendered judgment for the defendant, to which the plaintiff excepted.

R. Lund and J. Converse, for the plaintiff, cited 2 Story Eq. Jur. sec. 761; *Wilkinson v. Scott*, 17 Mass. 249; *Brackett v. Evans*, 1 Cush. 79; *Owen v. Estes*, 5 Mass. 330; *Preble v. Baldwin*, 6 Cush. 550; *Thayer v. Viles*, 23 Vt. 494; *Ascutney Bank v. Ormsby*, 28 Vt. 721; *Hodges & Wife v. Greene*, 28 Vt. 358; *White v. Miller*, 22 Vt. 380.

W. G. French, for the defendant, cited *Sherburne v. Fuller*, 5 Mass. 133; *Bishop v. Little*, 5 Greenl. 362; *Griswold v. Messenger*, 6 Pick. 517; *Putnam v. Cunningham*, 3 Fairf. 506; *Boyd v. Stone*, 11 Mass. 341; *Flint v. Sheldon*, 13 Mass. 442; *Hibbard v. Whitney*, 13 Vt. 21; *Chater v. Becket*, 7 Term 197; *Crawford v. Merrill*, 8 Johns. 253; *Van Alstyn v. Wimple*, 5 Cowen, 162.

POLAND, J. The contract or promise upon which the plaintiff's special count is founded, being admitted by the demurrer to be wholly a parol undertaking, is clearly within the statute of frauds. The promise as stated was that "he, the said defendant, would deed the said premises and give good title thereto to whoever the said plaintiff should sell the same to within the one year as aforesaid." A plainer case of a contract for the sale of lands could scarcely be conceived.

The plaintiff claims to support his suit mainly upon the ground that it is brought to recover the price or consideration of the land conveyed by him to the defendant.

Notwithstanding the general terms of the statute of frauds, it has always been held that when land has been sold and conveyed to the purchaser, the seller may maintain an action to recover the price, though not evidenced by any writing. But this is upon the ground that all of the contract which is required by the statute to be in writing, has been fully executed and performed, and that the promise to pay the money does not come within the statute.

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In the English courts they hold that unless the contract to pay the price is in writing, an action will not lie upon it, but they allow the seller to accomplish the same thing, by an action of general assumpsit for land sold. But where the promise or contract for payment is itself one coming within the statute, as a promise to convey to the seller other lands, or to reconvey the same lands to the seller or to a third person, the same has never been allowed to be enforced.

This has been settled in this State by the case of *Hibbard & Wife v. Whitney*, 13 Vt. 21. There the parties contracted by parol to exchange lands. The plaintiff conveyed to the defendant, according to the contract. The defendant conveyed to the plaintiff a portion of the lands agreed to be conveyed by him, but refused to convey the residue. It was held an action could not be maintained on such promise and refusal. The same is fully sustained by the cases cited by the defendant from Maine and Massachusetts. The plaintiff claims this case is taken out of the operation of the statute by a part performance, but it seems to us not such a case of part performance as has been held to have that effect even in equity. The defendant had paid the full consideration he was to pay to the plaintiff and received a conveyance from him. The further contract was that if the plaintiff could find a purchaser who would pay more than the defendant paid the plaintiff, the defendant would deed to such purchaser, and that the plaintiff should have half such excess of price. It seems wholly a distinct independent stipulation, as if he had agreed to reconvey to the plaintiff on the payment of a certain sum. If it could be regarded as a case of part performance, that does not commonly enable a party to sustain an action at law, but only for relief in equity upon the ground of fraud.

The plaintiff relies much on the case of *Hodges & Wife v. Greene*, 28 Vt. 358, as sustaining his case. He claims that case to establish that in all contracts for the sale of lands or any realty interest, required by the statute to be in writing, a tender or offer of performance by the seller, though refused by the purchaser, is such an execution of the contract as will enable the seller to recover the price by a suit at law. We are aware that such an opinion has to some extent obtained from that case as reported in

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the 28th Vt. The case was undoubtedly correctly decided, and the same case has since been again before the court, and again decided on the same facts for the plaintiffs, but the decision was put upon much narrower grounds than in the 28th. The defendant had made a parol purchase of the pew, and under that went on and wholly destroyed the pew and its identity in repairing and remodelling the meeting house. He had thereby received all the benefit and advantage he possibly could have by the purchase, and a deed of the pew could not vest in him anything more than he already had, so the contract was fully executed. It was regarded like a parol sale of growing trees, or a building on the vendor's land, which are so connected with the realty as to require a writing to make a contract to sell valid; still after the purchaser has gone on and removed the trees or building, and converted them to his own use, he cannot object to paying the price, because no deed, or conveyance, or writing, could more fully execute the contract of sale. The plaintiff's claim to recover under his general counts for his time and expenses in finding a purchaser of the land conveyed to the defendant, we think, has no legal ground to stand upon. He was not acting for the defendant or as his agent, nor under his employment. He was acting for himself and for his own benefit and advantage. If the defendant had deeded as he contracted to do, it is not claimed he was to pay for these services, so that the claim is merely for damages for his non-fulfillment of his contract, which contract we have seen could not legally be enforced, and if it could be, we do not see how the plaintiff could recover anything beyond the half of the additional purchase money, for that was all he was to receive if the contract had been fulfilled. It was never understood between the parties that the defendant was to pay the plaintiff for these services in any event, so that the relation of creditor and debtor never existed.

The judgment of the court below was correct, and the same is affirmed.

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GEORGE W. BLODGETT v. EDWARD DURGIN, JR.

Promissory note. Conflict of laws.

The law of the place of payment of a promissory note determines whether days of grace are allowed upon it, or not. Where no particular place of payment is fixed by the note itself, the place of execution is the place of payment, without regard to the residence of the parties, or the place at which the note is dated.

But *quere*, whether if the holder of a note, payable generally, is not aware that it was executed at a different place from that at which it is dated, he will not be protected, if he charges the indorser by presentment and notice according to the law of the latter place, even though he may not have done so according to the law of the place where the note was in fact executed.

If the holder of a note does not know the residence of an indorser and cannot ascertain it by diligent inquiry, it is sufficient to charge him, if the holder give him notice of its presentment and non-payment at the first opportunity.

If an indorser of a note with a full knowledge of the existence of facts, which in law would discharge him from liability thereon, promise to pay the note, he will be bound thereby.

The facts that three months had elapsed between the maturity of the note and such a promise by the indorser, that the latter had an agent at his residence who attended to his correspondence, and that he had himself received no notice of non-payment, were held sufficient evidence to authorize the court to submit to the jury to find thereon whether, or not, the indorser, at the time of making such promise, was aware that the holder had not taken the proper legal steps to charge him as indorser.

ASSUMPSIT against the defendant as indorser of a promissory note, dated Lebanon, N. H., January 1st, 1856, for one hundred and fifty dollars, signed by one Wood and payable to the defendant, or bearer, in six months from date.

Plea, the general issue, and trial by jury, at the December Term, 1858, in Windsor county,—**REDFIELD**, Ch. J., presiding.

The indorsement of the note was admitted by the defendant, who also conceded that it was executed by the maker and delivered to the defendant at St. Johnsbury, in this State, at the time it bore date. The defendant transferred and indorsed the note to the plaintiff, at Bradford, in this State, about the 20th of January, 1856, in payment of a bill of goods then sold him by the plaintiff.

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The plaintiff's evidence tended to show that the defendant was engaged in travelling from place to place selling a patent right, and had no permanent home; that nothing was said by the defendant in regard to his residence at the time of the indorsement of the note, and that the plaintiff knew nothing in regard to his having any fixed place of residence; that the father of Wood, the maker of the note, resided in Lebanon, N. H., and that that fact was known to the defendant, and that he informed the plaintiff, at the time of the indorsement, that the maker resided at Lebanon; that the maker of the note was at St. Johnsbury at the time it was executed, but it did not appear whether his business there was of a permanent character or not, or how long he had then been there, or how long he remained there after the execution of the note; that the note in question was presented to the maker for payment, at his place of residence in Lebanon, on the 1st of July, 1856, in the afternoon, and at no other time, and that payment thereof was then demanded and refused; that for some time previous to the maturity of the note, the plaintiff made diligent inquiry for the defendant at Bradford, and at all other places where he could ascertain that he had been, and tried to learn his residence, if he had any, but could obtain no information in regard to him or his residence, until October, 1856, when he accidentally met him at Royalton, and there gave him notice that he had demanded the payment of the note of Wood, that payment had been refused, and that he should look to the defendant for payment thereof. There was no direct evidence, however, that the plaintiff told the defendant that he had demanded payment of Wood on the 1st of July, or that no notice of non-payment had ever been sent to the defendant by mail. It was not claimed that any notice to the defendant of non-payment was ever mailed by the plaintiff.

The plaintiff's testimony further tended to show that at Royalton, at the time he was notified by the plaintiff, as above mentioned, the defendant promised to pay the note.

The defendant's evidence tended to show that his residence was in Compton, N. H., and that he so informed the plaintiff when he indorsed the note in question, and that he had an agent at that place who attended to his correspondence; that at his interview

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with the plaintiff at Royalton in October, 1856, he did not promise to pay the note, but complained that a portion of the goods, which were the consideration of the transfer of the note to the plaintiff, had not been received by him, and that a portion of those which he had received were of an inferior quality; that he merely proposed to the plaintiff to meet him at the plaintiff's place of business in Claremont, N. H., and promised that if the plaintiff would do what was right, he would then settle and pay him all he was entitled to for the goods which the defendant had received; and that this suit was commenced the day after this interview.

It was further proved that by the laws of New Hampshire three days of grace were allowed upon promissory notes.

1. The defendant requested the court to charge the jury that if the residence of Wood was in New Hampshire at the time he gave the note, the laws of New Hampshire must govern, and determine the time when the same became due and payable, and that as days of grace were allowed by those laws, the demand of payment on the first day of July, 1856, was not a legal demand so as to charge the indorser;

2. That if nothing was said, at the time the note was sold and indorsed at Bradford, about the defendant's residence and address, and if the plaintiff knew that the defendant was round about the country selling his patent, the plaintiff took upon himself the risk of notifying the defendant of demand and non-payment, and should at least have mailed a notice in due season to Bradford, or some other place where he supposed the defendant would most probably be;

3. That if the defendant at Royalton promised to settle or pay the note at some future time at Claremont, it was not a waiver of demand and notice, and if it was, that no suit could be sustained till after expiration of the time named;

4. That to constitute a legal *waiver* of demand and notice, the promise of the defendant at Royalton must have been made with a full knowledge of all the defects in the demand and notice, and be unconditional as it regards time, manner and circumstances.

The court refused so to charge the jury, but did charge them that the demand of the maker of the note was sufficient; that if

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the plaintiff was informed of the defendant's post office address before the refusal of the maker to pay the note, he was bound to remember it and give notice of the dishonor of the note as soon, at least, as by the mail of the next day; but that if the plaintiff had no knowledge of the defendant's residence and post office address, and by diligent inquiry could not ascertain either, or where notice would be likely to reach him, until the time of the meeting at Royalton, these facts would excuse the plaintiff from giving the immediate notice of demand and refusal otherwise required, and that the notice given at Royalton, in October, 1856, would be sufficient; that if the defendant, on being informed that demand had been made upon Wood, and that he had refused to pay the note, and knowing that no notice had been given him, promised absolutely to pay the note, although he might not expect to be sued upon it so soon as he in fact was sued, it would nevertheless amount to a legal waiver of notice of the dishonor of the note; but if the defendant only said on that occasion that he would pay what was fairly due the plaintiff, or if his promise fell short of what the court had stated was sufficient to amount to legal waiver of notice, it could have no effect in the case.

The jury returned a verdict for the plaintiff. The defendant excepted to the refusal of the court to charge as requested, and to the charge as above detailed.

E. Weston and Converse & French, for the defendant.

Washburn & Marsh, for the plaintiff.

ALDIS, J. I. The law of the place of payment of a promissory note determines whether in presenting it for payment days of grace shall or shall not be computed. By the law of New Hampshire three days of grace are allowed, but in this State none are allowed.

In the case at bar the note was presented to the maker at Lebanon, N. H., according to Vermont law, without an allowance for days of grace. The defendant claims that the law of New Hampshire should govern as to the presentment for payment, and therefore that he is not liable as indorser.

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The note was not made payable at any particular place, but was payable generally. Such a note is governed by the law of the place where made, for the parties cannot be said to have reference to the law of any other place; Story on the Conflict of Laws, sec. 317.

The bill of exceptions states it was conceded that the note was made and delivered at St. Johnsbury, in Vermont. It would seem to be clear, therefore, that the law of Vermont must govern it.

It is objected by the defendant that there was evidence to show that the parties to it intended that it should be governed by the laws of New Hampshire, and that this evidence should have been submitted to the jury. This evidence was, as the defendant claims, first, that the maker and payee resided in New Hampshire when the note was made; and, secondly, that the note was dated at Lebanon, N. H. As the place of payment determines whether days of grace should be allowed or not, the inquiry arises, do the facts here shown tend to prove that the note was to be payable in New Hampshire? We think not. The place of payment is a material part of the contract. If the note is payable at a particular place, parol evidence is not admissible to show it payable elsewhere, or payable generally. So if payable generally it can not be shown by parol that it was intended to be payable at any particular place. By making it payable generally, the parties must be presumed to have intended that the law of the place where it was made should govern; otherwise they would have made it payable elsewhere.

It is urged, however, that as it is dated at Lebanon, New Hampshire, and that is *prima facie* the place where it was made, this shows that the parties intended to have it payable in New Hampshire.

The place of date is not a part of the contract. It is not material to the validity of the note, and is always open to be explained. It does not make that the place of payment; Story on Promissory Notes 49; 2 Watts & Serg. 140; 3 McCord 394; Chitty on Bills 146.

In this case it is conceded that the place of making the note is in Vermont, and any presumption that might have been drawn

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from the date as to a different place of making the note, is conceded to be wrong. The place of date is said to be remote, and slight proof that the maker resides there; 3 Comst. 274; 3 Denio 145; 24 Wend. 358.

The note may have been so dated to indicate the residence of the maker.

If the plaintiff, not knowing that the note was made in Vermont, had been misled by the date to believe it made in New Hampshire, and had acted accordingly in presenting it for payment, the question would have been very different from the one now before us. But having ascertained the true place of making and acted upon it, we think the original parties to the note cannot hold him concluded by what at most is but a *prima facie* presumption. They could have concluded all subsequent holders by making the note payable in New Hampshire, but this they did not do. Neither can the residence of the maker and payee, if both are shown to reside in New Hampshire, control the note so as to make it subject to New Hampshire laws. No distinction is made between foreigners and citizens as to the operation of the *lex loci contractus*. It is the *place* where the contract is made that governs, not the *residence* of the contracting parties.

This is the doctrine as laid down by Judge STORY in his Conflict of Laws sec. 279. And the same principle is directly recognized in *Bryant v. Edson*, 8 Vt. 325; and in *Bank of Orange Co. v. Colby*, 12 N. H. 520. But we think the evidence did not tend to show that the maker resided in New Hampshire when he made the note. It is too indefinite on that point to fairly raise the question.

II. We do not think the fact that the indorsement was made at Bradford, when it appears that the indorser had no residence there, and was there only occasionally as he traveled about the country peddling, made it incumbent on the plaintiff to send a notice to the defendant at that place.

Under the charge of the court, the jury must have found that the plaintiff did not know, and by diligent inquiry could not ascertain where the defendant resided, or where notice would be likely to reach him, until he met him at Royalton and notified him. By all the authorities this was sufficient.

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III. The jury must have found that the defendant was informed at Royalton that demand had been made of Wood, (and by demand we must understand *legal* demand) and that he had refused to pay; and that the defendant then knew no notice had been given him or his agent; and that under these circumstances he promised absolutely to pay the note. This was a waiver of the want of previous notice and bound the defendant, for it showed knowledge of the facts which would in law discharge him from his indorsement, and that is all that is required; *Tibbets v. Dowd*, 23 Wend. 379; 1 Aik. 39, *Nash v. Harrington*; 3 Kent Com. 113; Edw. on Prom. Notes 650-1; Chitty on Bills 501, and numerous cases cited in notes; Story on Prom. Notes sec. 362.

It is said there was no evidence tending to show that he knew no notice had been given. But when we consider the lapse of time between the time of payment and the meeting at Royalton, the residence of the defendant, his having an agent at his residence who attended to his correspondence, we think these circumstances, taken in connection with the promise made at Royalton, justified the court in putting the case to the jury upon this point as it was presented in the charge.

Judgment affirmed.

 TIMOTHY K. WEST v. JESSE P. BANCROFT.

Highways. Towns.

The proper public authorities of a town or village have a right to place in a highway a reservoir for the purpose of retaining water to sprinkle the highway with; and the owner of the fee of the land, where such reservoir is placed, cannot maintain an action against such authorities for so doing.

Besides the use of highways for the sole purpose of travel, the public may use them for many other objects necessary for the public convenience and health, such as laying water pipes and constructing drains, sewers and reservoirs, etc. PIERPOINT, J.

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TRESPASS qu. cl. Plea not guilty, with notice of special matter in justification, to the effect that the defendant was one of the trustees of the village of St. Johnsbury, elected under the provisions of the act incorporating that village, approved November 23, 1852; that by that act the village were authorized to construct and maintain such aqueducts and reservoirs as they should judge best, and to lay out, alter, maintain, clean, improve and repair the streets therein; and that such cleaning, improvement and repairs were required by said act to be made by the trustees; that the close in question had been for more than twenty years previous to the 25th of April, 1853, and still was, a common and public highway within the limits of said village; that on that day the defendant, with the other trustees, caused an excavation to be made near the margin of said traveled highway, and in the highway, and constructed therein a reservoir into which to conduct water to be used in sprinkling the streets of said village, and also to protect the buildings in the village from fire, and for other public uses, and that these were the same supposed trespasses complained of by the plaintiff in his declaration.

The cause was tried by the jury, at the June Term, 1859, in Caledonia county,—BARRETT, J., presiding.

The defendant admitted the digging and making the reservoir for the purpose and under the authority set forth in his notice of defence. It appeared that the reservoir was situated a little northwardly of the court house in St. Johnsbury, and just eastwardly of the traveled track of the highway, passing in front of the court house.

The plaintiff introduced evidence tending to show that the reservoir was on land belonging to him, and outside of the limits of the public highway.

It was admitted by the plaintiff that the defendant, in his acts which the defendant claimed to be trespasses, acted under full official authority as trustee and in behalf of the village of St. Johnsbury, duly incorporated and organized and acting under the laws of this State, and that his acts were all lawful in the discharge of his official duty, unless they were done upon the plaintiff's close, and that the reservoir in question was made for the *public use and benefit*, and was kept and maintained for that pur-

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pose. It appeared that for a period commencing earlier than the year 1790, the public highway in said village had existed and been in use continuously in front of the court house and thence northwardly through said village; that on the western side of this highway, opposite and contiguous to the reservoir, dwelling houses and fences for door yards had permanently and constantly existed for more than forty years, and that the door yards out to said fences had been constantly possessed, occupied and used by the respective owners thereof as such; that the travel on said highway passed near to said fences on the easterly side thereof, and the public had used the ground to said fences as a highway during all of said period. No original survey and laying out of said road was produced or shown on trial, but the plaintiff's evidence showed that it was originally laid out and established four rods wide, adjacent to the cistern, and that the fences on either side of the road adjacent to the cistern had for a period of more than fifty years been more than four rods apart; and there was no evidence tending to show, nor was it claimed by the plaintiff on the trial, that the public had lost the right to a road of that width, and the court understood it to be conceded that the highway was during all the time of its existence, and still is, four rods wide.

The plaintiff claimed, and his evidence tended to shew, that the eastern boundary of the highway, as originally surveyed and located, contiguous to the cistern, was never marked by a fence, and though a fence had existed for more than fifty years on the eastern side of the highway contiguous to the reservoir, that it was considerably further east than the true eastern boundary of the highway. With reference to the point put to the jury upon which they rendered a special verdict for the defendant, the court assumed such to be the case.

The evidence tended to show that the reservoir, and all the digging by the defendant in the making thereof, were within four rods eastwardly from the said door yard fences.

The court charged the jury that the putting in of a reservoir or cistern by the public authority of the village for public purposes, within the limits of the public highway within the village, would not constitute a trespass for which the owner of the fee

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could recover, even though the land might revert to him in case such highway should be discontinued; that if said door yard fences had existed for as long a period of time as the evidence showed, and the yards had been continuously enclosed thereby, and used as such, upon the one side of the fences, and the public during all that time had used up to the fences upon the other side, as and for the public highway, those fences had become the western limit and boundary of the highway; and as the plaintiff's evidence showed, and it was not denied by the plaintiff, that the public highway was four rods wide along contiguous to said door yard fences and adjacent to the reservoir, if the jury should find that the reservoir and the digging done by the defendant in making it were within four rods eastwardly from the door yard fences, they would be within the limits of the public highway.

To this charge the plaintiff excepted, and the jury returned a verdict for the defendant.

Child & Benton, for the plaintiff.

A. J. Willard and Stoddard & Clark, for the defendant.

PIERPOINT, J. We think that in view of the evidence, and the admissions of the parties, as to the location of the highway in the village of St. Johnsbury, there can be no doubt that if the acts complained of in this case were done within four rods east of the western limit of the highway, as used for the last forty years, they were done within the highway, and that the charge of the court on that question was correct.

The only remaining question is as to the right of the public to put a reservoir, or cistern, into the earth, within the limits of the highway, for the purpose of retaining water to be used in sprinkling the streets and extinguishing fires. There is nothing stated in the bill of exceptions tending to show, either from the place where this cistern was put, or the manner of its construction, that it was likely to interfere with the full and perfect use of the highway by the public, or to produce any special injury to the owner of the adjoining land, and the owner of the reversionary right in the highway; but the case stands upon the bare right of the public to do the act under any circumstances.

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The power of the public over highways is not confined to their use for the sole purpose of travel. Many things may be done therein for the promotion of the public convenience and health, such as laying water pipes, constructing drains and sewers, making reservoirs, and many other acts which the public may require; and when these acts are done by the public authorities in a judicious manner and with proper care, having reference to the rights of adjoining proprietors, and the owners of the fee of the land, if such proprietors are incidentally affected injuriously thereby, or the owner of the fee sustains a technical damage, the law furnishes no remedy therefor.

But in this case it is not necessary to resort to this principle, even to justify the acts of the defendant. It is conceded that this reservoir was built by the defendant as a public officer, having charge of such matters, and in the discharge of his official duty; that the object was to retain water to be used in sprinkling the streets, and for other public purposes. This, we think, clearly comes within the object and purpose for which the highway was originally laid out.

All those acts which tend to facilitate travel, and add to the ease, comfort and convenience of the traveler, or his beasts, whether it be by cutting down the hills, filling the ravines, paving the roads, erecting watering troughs, or sprinkling the streets, are acts which it is proper and often necessary for the public to do. And in a village containing so numerous and active a population as St. Johnsbury, no other one of these acts, perhaps, would add so much to the comfort of the passers on the highway, as well as all the inhabitants of such village, as that of sprinkling the streets; and such act, instead of infringing on the rights of the reversioner, can hardly be said to approach that uncertain line constituting the true boundary between the rights of the public and the owners of the fee in the highway.

The judgment of the county court is affirmed.

Bartlett v. Wood et al.

S. J. BARTLETT v. FORIS WOOD AND *Trustees*, HOLT, SPEAR
AND LONTO.

Exceptions. Trustee Process. Fixtures. Tools. Attachment.

When a case passes to the supreme court upon exceptions, error must be shown by the exceptions, or the judgment below will stand.

In the trustee process, if the indebtedness of the trustee to the principal debtor is payable in labor or specific property on demand, and there had been previous to the service of the trustee process, no breach of the contract, the judgment against the trustee must be that he is chargeable for the amount of his indebtedness, payable to the plaintiff in the specific manner prescribed by the original contract.

Machinery in a blacksmith's and wagon maker's shop, which, though fastened to the building, was only so attached for the purpose of making it firm for use in its place, and which could be removed without seriously injuring the building, said machinery consisting of a boring lathe, an engine lathe, a wood turning lathe, a press drill, a press punch, an upright saw, and a circular saw, all being propelled by water, held to be personal property and not fixtures, and as such liable to attachment by the trustee process.

The doctrine of the cases of *Hill v. Wentworth*, 28 Vt. 428, and *Fullam et al. v. Stearns et al.*, 30 Vt. 443, in regard to fixtures, reaffirmed.

If personal property owned in common be in the possession of a third party, the interest of one of the owners therein may be attached by the trustee process against the party in possession.

TRUSTEE PROCESS. The case was referred to a commissioner who reported the following facts:

The principal debtor, Wood, had for some time previous to October 5th, 1858, been engaged in the business of blacksmithing and carriage making at Derby, and the trustees had each been individually employed by him as workmen, and he was indebted to each of them in different amounts. On that day, Wood being in embarrassed circumstances, sold his stock to the trustees at cost, including freight, and at the same time rented them the shop which he had occupied, together with the machinery and tools therein, for one year at the annual rent of seventy-five dollars. The trustees at the same time agreed with Wood and one Chandler, to whom Wood was indebted in the sum of seventeen dollars and forty-seven cents, that they would pay that sum to Chandler, who thereupon discharged Wood from such indebted-

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edness. It was agreed between the trustees and Wood that the aggregate of the latter's indebtedness to each of them, and the Chandler debt assumed by them, should be applied in payment for the stock purchased by them, and of one year's rent of the shop, machinery and tools. The trustees further agreed with Wood that if after making this application they should still be indebted upon such purchase to the defendant, they would pay in their work fifty dollars to one Page, to whom the defendant was then indebted in that amount. Page, however, was not aware of this agreement at the time and was not apprized of it until after the service of this trustee process, but after that time the trustees did work for him with an understanding that fifty dollars worth of their work should be applied in payment of Wood's debt to him unless this trustee process interfered with such a disposition of the matter. The trustees at the time of such purchase, further agreed that if, after paying the Page claim, they should still remain indebted to the defendant, they would pay him such balance in their work on reasonable notice, the articles manufactured to be delivered at their shop, and at cash prices. At the time of this purchase no invoice had been made of the stock, and the parties were not certain whether its value would be sufficient to meet the indebtedness from Wood to the trustees or not. The contract was entirely verbal except the lease.

The trustees and Wood then proceeded to invoice the stock, and it was found to amount to four hundred and sixty-nine dollars and twenty-nine cents. The trustees immediately took possession of the shop, machinery, tools and stock, formed a copartnership among themselves, and commenced the same business in which Wood had been formerly engaged, and at the date of the commissioner's report were still engaged therein.

After the formation of the copartnership and subsequent to the service of this trustee process upon them, the trustees settled with the defendant and found that the aggregate amount due from him to them, together with the Chandler debt, was two hundred and fifty-eight dollars and twenty-five cents. The shop leased by Wood to the trustees was built by the former for a carriage and blacksmith shop, and had always been used for that purpose. At the time it was built, certain machinery, being such as was

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required in that business, was put into the shop, and so arranged as to be propelled by water with the ordinary gearing for such machinery.

The following is a description of the articles of machinery so put in, and the mode in which they were situated in the building :

In the woodshop was an upright saw, and the timbers connected with it were framed into the floor of the shop, and boards were nailed to the timbers of the shop overhead, and the timbers connected with the saw were framed into these boards. There was also a circular saw in the woodshop, fixed in a frame, which frame was nailed with large irons to the floor, and also mortised into it ; also a boring lathe, fixed or fastened into a frame, bolted to the floor with two iron bolts, and braced on both sides by braces nailed to the frame and floor ; an engine lathe, framed into large heavy timbers, and securely nailed to the side of the shop. This engine lathe was owned in common by the defendant and one Fairchild. It was originally purchased by Wood and Fairchild, and had ever since been used in carrying on the carriage business. There was a wood turning lathe which sat on this engine lathe frame and ran by the same pulleys. There was a trip hammer in the blacksmith's room, built as follows : There was a head or anvil block consisting of a large timber, one end of which rested on the ground. This timber passed through the floor of the blacksmith's shop, the upper end of it standing over two feet above the floor. The anvil on which the hammer struck was bedded into the end of this anvil block. Two heavy timbers were framed at one end into this head or anvil block, and the other ends were supported by upright timbers framed into them. These upright timbers passed through the floor to the ground, where there was a large timber for a bed piece, into which they were framed. The handle to the hammer was a stick of timber, and the end most distant from the hammer was fixed into the timbers which were framed into the head block.

There was also in the blacksmith's shop a press drill. The table supporting the article to be drilled was mortised into the side of the building. The rest of the machinery was bolted to a plank, securely spiked to the building. The table of the press drill was a piece of common plank about ten inches in width by fifteen

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inches in length. This plank tapered off at greater length, forming a sort of handle which was mortised into the side of the building, and this table was supported by a brace underneath it, and was in no manner connected with the rest of the machinery, its whole use and object being to support the article to be drilled.

A press punch sat in a bench in the blacksmith's shop, and was intended to be fastened to the bench, which, however, had not yet been done. The foot piece of this press punch was situated under the bench, and was fastened to the side of the building. This press punch was not intended to be, and was not carried by water.

There was also a tire roller in a frame much like a grindstone frame, not stationary, moved by hand. There were also in the blacksmith's shop three good anvils and one poor one, and they were all required in the business. The other tools were such as would be required by one blacksmith in carrying on his trade, and no more. All the machinery and tools above named were used in carrying on the business for which the shop was erected. A tire roller is required and is generally kept by blacksmiths.

Previous to the passage of the law of 1856, relative to mortgaging machinery, Wood sold the shop to C. L. Kelley, Moses Wood and C. R. Clough, and took a mortgage back for a part of the purchase money, and transferred this mortgage security to Wm. M. Dickerman. In this deed to Kelley, Wood and Clough, and in the mortgage, the machinery then in the shop was mentioned as being included therein, and soon afterwards Clough conveyed his interest in the premises and machinery to Moses Wood and C. L. Kelley, and finally the defendant, Foris Wood, repurchased the premises and machinery, and agreed to pay the mortgage debt to Dickerman, which, at the time of the hearing, amounted to about eight hundred dollars. Subsequent to the service of the trustee process the defendant quitclaimed the shop, machinery and tools to the trustees, who agreed to pay the Dickerman incumbrance thereon.

The commissioner further reported that the defendant was a blacksmith and carriage maker by trade, but that since the making of the lease above described to the trustees, he had not been

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engaged in the business of his trade. At the time of the service of the trustee process the tools and machinery, except one-half of the engine lathe, belonged to the defendant, and were held by the trustees under their lease from him.

The commissioner also found that the trustees did not take the lease nor purchase the stock with any design to defraud any one, but merely to secure their own claims and provide themselves with business, and that they agreed to pay the full value of the rent and stock.

The trustees claimed a right to the shop, machinery and tools until October 5th, 1859, under their lease. The machinery, except the trip hammer, could all be taken out of the shop without seriously injuring the main part of the building. The trustees also claimed that the machinery was a part of the real estate, and that the tire roller and other tools were tools of the defendant's trade, and exempt from attachment, and that therefore the trustees could not be made chargeable either for the machinery or the tools.

The plaintiff claimed that the trustees were chargeable for the machinery and tools, and that they should be ordered to deliver them to him at the expiration of the lease.

The commissioner further reported that the amount of stock purchased by the trustees was four hundred and sixty-nine dollars and twenty-nine cents; that the rent of the premises from the date of the lease (being October 5, 1858,) to the third day of June, 1859, (being the date of the disclosure and hearing before the commissioner,) amounted to the sum of forty-nine dollars and fifty-nine cents, making in the whole the sum of five hundred and eighteen dollars and eighty-eight cents; that deducting from this sum the indebtedness of the defendant to the trustees at the time of the sale of the stock, and also the Chandler debt, amounting in the whole to two hundred and fifty-eight dollars and twenty-five cents, would leave the sum of two hundred and sixty dollars and sixty-three cents, for which amount the commissioner held the trustees chargeable, to be paid in work at their shop in Derby on reasonable notice, or in such property as they manufactured, or both, according to the election of the plaintiff.

If the court should be of the opinion that the trustees were also entitled to deduct from this indebtedness to the defendant the

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fifty dollars which they had conditionally promised him they would pay to Page, as above stated. then the commissioner found them chargeable for fifty dollars less than the amount above reported.

Upon these facts the county court for Orleans county, at the June Term, 1859,—POLAND, J., presiding,—adjudged the trustees chargeable for the sum of two hundred and sixty dollars and sixty-three cents, to be paid in work, as detailed in the report, deducting therefrom the trustees' costs. The court also adjudged the trustees chargeable for three anvils, including the poor one described in the report, to be delivered by the trustees to the officer holding the plaintiff's execution against the defendant on demand after the expiration of the lease from the defendant to the trustees.

To this judgment of the court the plaintiff excepted.

Edwards & Stewart, for the trustees.

A. D. Bates, for the plaintiff.

BARRETT, J. The questions in this case arise on exceptions taken by the plaintiff to the judgment against the trustees. There are two subjects of complaint; one that the judgment should have been for the whole year's rent, as well as for more of the specific chattels held under lease by the trustees; the other, that the judgment should have been in different form as to the mode of paying the amount found due for rent, and for the property that was purchased by the trustees of the defendant, Wood.

I. The same rule is applicable to this as to any other case that comes before this court on exceptions. Error must be shown by the exceptions or the judgment must stand. We make this remark with particular reference to the point made in argument as to the rent. We well understand and fully recognize the law by which a lessee may be holden for rent for the full term of his lease, even though the buildings should be destroyed by fire, flood, or tempest before the expiration of the term. But whether he is so holden or not would depend on the specific provisions of the

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lease. In this case the lease is not before us, nor are its terms stated, except as to the time it was to run, and the rate of the rent to be paid. The lease, as it was shown to the commissioner, did not appear to him to bind the lessees to pay the rent absolutely for the full term. The county court have acted on his finding, and rendered a judgment touching this subject. There is nothing before us to show error in that judgment in this respect, and so of course we do not find any.

II. We see no error in regard to the mode prescribed for paying the two hundred and sixty dollars and sixty-three cents. It is directed to be paid in work, as particularly stated in the report, which we understand to mean that it is to be paid in work, according to the terms of the contract between Wood and the trustees. This is the only judgment warranted by the statute. The trustees cannot be held to pay in any other mode, nor upon any other terms than those provided in the contract under which they purchased and held the property. If there is difficulty or embarrassment in realizing the fruits of the judgment by the plaintiff, it is his misfortune, arising from the nature of the subject and the state of the statute law.

III. Under the decisions in this State, commencing early and now embracing two very fully considered cases of recent date, we are compelled to regard the boring lathe, the engine lathe, the wood turning lathe, the press drill, and the press punch, as being unquestionably personal chattels and subject to attachment and levy of execution as such. We should have as little trouble in so treating the upright saw and the circular saw, were it not for what is said about the mode of their attachment to the building. We understand from the report, that the upright side timbers of the upright saw are framed into the floor by a tenon received into a mortise in the floor, and that this is done for the purpose of holding it steady, to the same intent as might have been accomplished by bolts or cleats at the foot of these side timbers. We understand this to have been done, not by way and for the purposes of incorporating the said machine into the building as a part of it, in a similar manner and to the same intent as is done in the case of an ordinary saw mill for sawing logs. The mode in which the frame is fastened overhead shows that the purpose was merely

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to make a *moveable machine* firm for use in that place, which might, on being removed, be as well placed in any other suitable shop, and be fastened and used in a similar way. The mode in which the *circular saw* is fastened is less like incorporating it with the shop, than is that of the upright saw. The commissioner expressly finds that said machinery could be taken out of the shop without seriously injuring the main part of the building. Independently of the particular manner in which these machines are fastened for use in said shop, it is beyond question that they are mere chattels. That manner of fastening is the only thing shown in the case that could operate to change their character. We think, to treat them in view of that manner of fastening, as being a part of the realty, would do violence to the case of *Hill v. Wentworth*, 28 Vt. 428, and *Fullam et al. v. Stearns et al.*, 30 Vt. 443. We do not propose any further discussion in this case of the law of fixtures. The law as developed, expounded and applied in those cases, would become no clearer, either as to its principles, or its due application, by what might now be said.

The articles, now named, being personal chattels and being in the hands of the trustees at the time process was served, said trustees became chargeable for them by force of the statute, and the expositions thereof by this court in cases that have passed into judgment. As to the engine lathe, of which it appears that the defendant is the owner of an undivided half, nothing in particular need be said. The defendant's interest in it is subject to the attachment of his creditors. Unless the other joint owner has asserted his right and taken it from the possession of the trustees, it is chargeable with execution in their hands in virtue of the defendant's interest, the same as any other of the articles. The officer who may have the execution will act under it agreeably to his judgment of his official duty. The trustees will be acquitted by having the article ready for his custody on lawful demand. In case the article has been taken from them by the other joint owner, it will be reasonable to settle any question that may arise in respect thereto, when it shall be legitimately before the court.

The claim as to the trip hammer is abandoned by the plaintiff. Upon the facts reported we regard the *tire roller* as being a tool

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of the trade of a blacksmith, and therefore exempt from attachment and trustee process.

The judgment of the county court being correct as far as it went, is now reversed *pro forma*, and judgment is here rendered that the trustees are liable according to the terms of the judgment of the county court, and in addition thereto for the said articles named in said report and above named, to wit, the upright saw, the circular saw, the boring lathe, the engine lathe, the wood turning lathe, the press drill, and the press punch, to be delivered to the officer holding the execution that shall be issued in this case, upon lawful demand made in that behalf, the trustees' costs in this court and also in the county court to be deducted from the *indebtedness* for which said trustees are adjudged chargeable.

THE STATE OF VERMONT v. WILLIAM H. M. HOWARD.

Criminal law. Miscarriage. Accomplice. Evidence.

It is not essential to the commission of the offence of attempting to procure the miscarriage of a woman pregnant with child, under the 8th section of chapter 108 Comp. Stat., p. 560, that the *foetus* should be alive at the time the attempt is made.

In a criminal prosecution the testimony of an accomplice, in order to have any weight with the jury, must be corroborated upon points material to the conviction, and to such an extent as, upon the whole case, to satisfy the jury beyond a reasonable doubt of the guilt of the respondent.

Where the fact of a deceased party's going to the respondent's house for the purpose of having him procure an abortion upon her person, was material, it was held that the declarations of such person as to her purpose in going there, made at the time of her departure for that place, were competent evidence as part of the *res gesta*.

The question whether statements, offered as *dying declarations*, are admissible as such, is to be decided solely by the court.

The state of health or feelings of a person, when material, may be proved by such person's statements in regard to them made at the time.

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INDICTMENT in six counts. The first three counts charged the respondent with attempting to procure the miscarriage of Olive Ashe by means of instruments, in consequence of which she died. The fourth and fifth counts charged the same attempt by means of poisons and noxious things, with a similar result, and the sixth count charged the crime of manslaughter by causing the death of the said Olive by wounding her with instruments in the womb.

The respondent pleaded not guilty, and the cause was tried by jury at the January Term, 1859, in Orange county,—BARRETT, J., presiding.

The government gave evidence tending to show that Olive Ashe of Sutton, a girl of about twenty years of age, and her twin sister, Olivia Ashe, left Sutton about the 28th day of December, 1857, and by railroad went to Levi M. Aldrich's, in Bradford village, he being their cousin, upon the pretence to their mother, a widow, of making a visit; that Olive was at that time in usual flesh and health so far as was known to the family; that the sisters arrived at Aldrich's house and remained about two weeks, in the character of guests and visitors; that they then left his house upon a pretence that they were going to meet some friends at the Fairlee depot, with whom they were going to take an excursion into New York or Massachusetts for a ride; that they went to Fairlee depot, and left the cars and procured a carrier to carry them in his wagon to the respondent, who lived north of that depot about six miles, and about three miles below or south of Bradford village, and kept house and office as a doctor; that on Friday, the 29th of January, 1858, the mother of Olive went to the respondent's in pursuance of a telegraphic dispatch, caused by the respondent to be sent to her that morning, and that about six o'clock in the evening Olive died at the respondent's house, that he procured a coffin for her corpse, and on Saturday the corpse was conveyed to Sutton by railroad, the mother going in the same train; that on the 3d of February, 1858, her corpse was disinterred for the purpose of a post mortem examination, with a view to ascertaining the cause of her death; that such examination was made by Dr. Frost, a physician and surgeon of St. Johnsbury, in presence of Drs. Bliss and Carpen-

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ter and other persons ; that the examination extended throughout the body and internal organs, but no examination was made of the brain ; that on such examination the external opening of the vagina was greatly extended, so that the hand, without much difficulty, might have been passed in ; that the uterus was enlarged in size, its walls thickened and its blood vessels increased in size and number as is usual in case of pregnancy, and internally there were marks of the attachment of a *placenta*, that had been removed, leaving the open sinuses, as is usual in case of the removal of the *placenta* upon the birth of a child ; that the breasts were distended and contained milk, and a dark areola about the nipples, as is usual in case of pregnancy ; that the mouth of the womb was then about one and one-half inch in diameter, its natural condition in a woman who has not borne children being about one-eighth of an inch ; that the neck of the womb was greatly inflamed, and thereby the lining membrane had all been taken off ; that there were sloughs and holes in the substance of the neck ; that the inflammation was caused by violence by instruments used on that part of the womb ; that the body of the womb was in a healthy condition ; that all the internal organs of the body were in a natural and healthy condition. Dr. Frost testified that in his opinion the direct cause of death was the inflammation of the neck of the womb and perhaps hemorrhage ; that there was a sufficient cause of the death ; that there had been a *fetus* in the womb from four to seven months old that had been expelled before the examination ; that he removed the *uterus* at the examination and had preserved it in alcohol.

On the request of the respondent's counsel he produced it and it was exhibited to the jury, and the various parts and marks pointed out and described.

The government then introduced Olivia Ashe, twin sister of the deceased Olive, as a witness, whose testimony tended to show that during the summer and till sometime in the fall Olive had been at work in the family of a Mr. Beckwith, and had thence returned to the family home, and remained till she started for Bradford as above stated ; and for two or three weeks before that time the witness had been at home most of the time and had slept with Olive ; that Olive's health was good enough if it had

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not been for the condition of her mind, and as good-as any one's is in her situation; that the witness and Olive went from home together to Aldrich's in Bradford as above stated.

The government asked the witness what was the purpose of their thus leaving home as understood between them at the time of leaving. This was objected to by the respondent. The government attorney claimed that in its connection with the act of leaving, it was proper as giving character to the act, and as tending to account for and explain other transactions and incidents that would be developed in the progress of the trial, disclaiming any use of it taken by itself as tending to show that the respondent had committed the crime charged. The court permitted the question to be asked, and the witness answered that, "I had some talk of going on a visit before I knew she was going. I and she supposed her to be pregnant, and she left Sutton to get an abortion procured, as was understood between us at the time we left." To the admission of this testimony the respondent excepted.

On further examination the witness gave evidence tending to show that after having been at Aldrich's several days, and on the day before going to the respondent's, the witness and her sister, Olive, met at the Vermont House, in the village of Bradford, Daniel Beckwith, a young man, son of the Mr. Beckwith with whom Olive had lived the previous summer, and there it was first determined to go to the respondent's. On cross examination she testified that when they left home she did not know *where* her sister was going to for the purpose of having the abortion procured; that they had not in mind to go to the respondent's; that they knew there was such a man, but knew nothing about him; that what determined her sister to go to the respondent's for that purpose was the advice of Beckwith when they met him at the Vermont House as above stated. Also that she supposed her sister to be pregnant before her sister told her so, for the reason that she was *bigger*; that said Daniel Beckwith had told her of Olive's condition before she spoke to Olive about it; that the day after Beckwith thus told her she, for the first time, spoke to Olive about it; that she had thought of it before he thus told her; also that when they came to Bradford they expected to meet Daniel Beckwith there, that it had been so appointed, and

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that when he came he called at Aldrich's for Olive, and she went to the hotel with him, and in a little while she came for the witness who went with her to the Vermont House, and there saw Beckwith; also that Beckwith made arrangements for them to go to the respondent's.

The testimony of Olivia, on her examination in chief, further tended to show that she and her sister Olive went from the Fairlee station to the respondent's at the time and in the manner above stated, and on arriving there they made known to the respondent the condition in which Olive then was, that she was pregnant, and in reply to his inquiry, he was told that she was six months advanced; that they proposed the subject of his procuring an abortion, but he did not give any decided answer at that time, and gave them to understand that he wanted to see Beckwith before giving a decided answer; that they remained there, and after several days Olive received a letter from Beckwith, a part of which was read to the respondent, and thereupon he concluded to go through with the operation for the sum of one hundred dollars; that he said it would take some three or four weeks to get her through with it; that he then prescribed and gave her medicine in the form of bitters, about a goblet full at a dose, two or three times, though the witness was not sure as more than once; that it operated as an emetic and cathartic, the witness not knowing as she heard him say for what purpose; that they took a room up stairs in the respondent's house, on their arrival, which they kept till the death of Olive; that after he had given Olive this medicine, and on Friday of the week next after their arrival at the respondent's, the respondent performed an operation on Olive with instruments, she lying on the bed in their room, the witness and respondent only being present; that he had three or four instruments present; that he used two or three as witness thinks, though she was not positive that he used more than one; that he used the instruments internally upon the private parts of Olive; that Olive complained of pain and its hurting while the operation was going on; that discharges of water came from her, which continued for two or three hours and more; that on the next day he made another operation in a similar manner and attended with pain, indicated by complaints and gripping

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of the hands; that the result of this operation was flowing; that the witness saw considerable blood; that near night of the same day the respondent performed a third operation, making the same use of instruments as in the former operation, and in connection therewith introduced his hand; that the result was a child about two-thirds as large as full grown; that witness saw it in the respondent's hands, and it was carried out of the room by him, and not by her seen afterwards; witness was not asked by either party, nor did she testify whether she saw signs of life in the child; that this operation was attended with indications of pain; that the flowing at that time was not large, but flowing continued for a few days; that at these operations only the witness and respondent were present; that the witness had the care of Olive and was with her most of the time; that after the second operation she did not sit up much, but did occasionally to have the bed made, and to rest her, till within two or three days of her death; that the witness did not think her rational long after the last operation; that she talked wildly and acted violently; that she died Friday about six o'clock in the evening, January 29th.

The government produced and gave in evidence a copy of the record of the justice before whom the respondent was brought upon the charge of the crime for which this indictment was found, and by whom he was bound up to the county court to answer thereto, showing that the said Olivia thereupon appeared as a witness and was recognized to appear as a witness upon said charge before the county court.

Olivia then testified that she was at said court of inquiry, and was called on to testify; that there was no examination, the respondent waiving an examination; that after that trial she returned to Sutton, and afterwards went to Montreal.

The government here offered to give evidence by Olivia, tending to show that a few weeks before the June Term, 1858, of the Orange county court, the respondent participated in procuring her to go out of the State and to Montreal, agreeing to find her all the money she wanted while she was gone, for the purpose of preventing her from being used as a witness against him in the prosecution of the crime for which he was bound up as aforesaid,

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and for which this indictment was found, and that she went to Montreal accordingly and remained a few weeks, when, receiving all the money she needed, she returned to Sutton two or three days before June Term, 1858, of said court, through the intervention of her friends.

This evidence was objected to by the respondent. The objection was overruled and the evidence accordingly was given, to which the respondent excepted.

Dr. Selim Newell of St. Johnsbury, a physician and surgeon, was introduced by the government, whose testimony tended to show that he examined the uterus of Olive Ashe the morning after it was removed by Dr. Frost, as above stated; that its appearance indicated a state of pregnancy, and that a *fœtus* had been expelled; that in his opinion the marks within the neck of the uterus were caused by mechanical injury; that he knew of no other causes that would produce such appearance; that such a wound as was indicated would have produced hemorrhage; that he did not know to what extent, but that it might be to the extent to produce death; that in his opinion the *placenta* was in this case removed but a few hours before death; that the woman could not have lived more than five hours after the removal of the *placenta*, and that bleeding would continue up to the time of the change called *dying*.

On cross examination, in answer to questions put to Olivia Ashe, she testified that she knew a girl at the respondent's by the name of Margaret Kelley; that she did not remember of going to her in the evening of the day of their arrival at the respondent's to get a pail for soaking some clothes, and saying that her sister had been traveling, and it had made her worse, nor of having any pail for such a purpose, nor of handing a pail back the next morning with bloody water in it; that she did not think she did. The respondent introduced Margaret Kelley as a witness, who testified that Olivia Ashe was in the back part of the house the evening after her arrival, where she, Margaret, was at work, and wanted a pail to soak some clothes in, saying that her sister was unwell, and it made her worse coming in the cars; that she gave her a pail; that the next morning she found it in the back room with some bloody water in it.

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The respondent gave evidence by other witnesses tending to show that they were from time to time in the room and about the bed of Olive for some days before her death, and that they did not see any bloody clothes about her on her bed.

The respondent gave evidence tending to show that Olive rode from Fairlee depot to the respondent's in about an hour; that on her arrival at the respondent's she looked very pale; that her lips were sore; that she looked dark under her eyes; that she arrived there a little before or about noon; and that in the course of that afternoon she was seen lying on the sofa in the parlor.

The respondent offered to show by a witness (Miss V. Bartlett) what Olive said to her that afternoon as to her health, and also as to what she said caused the sores on her lips, viz: that she said she was very sick, and very much fatigued by the journey. To this the State's attorney objected, and it was excluded by the court, to which the respondent excepted.

The respondent offered to show by Susan Squires, a witness introduced by him, who went to the respondent's on the 23d of January, 1858, and remained there till after the decease of the said Olive, and up to the 26th of last June, as *dying declarations* of Olive Ashe, what she told the witness about noon of Thursday, the day before her death, and the court permitted the testimony to be given as addressed to the court, in order to determine whether it was admissible as *dying declarations*. The witness then testified as follows: that on Thursday, she had conversation with Olive about noon, while her sister was at dinner; that Olive told the witness she thought she could not live and did not expect to, that she had been taking powerful poison medicines before she came to Dr. Howard's, and she thought she had destroyed her life, and that that was what caused her mouth to be sore, that she hoped they would not blame the doctor, and that she thought he had done everything he could to restore her health, that she had been out of health a long while; that nothing else was said with reference to the subject; that the witness did not see any indications that she was not perfectly sane, and that witness had never discovered any insanity about her, and had no suspicion of it; that she seemed sane through that day, but that on the next morning she seemed to have lost her reason.

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On cross examination the witness testified that she had been at the respondent's some for over two years before the 23d of January, 1858, sewing and to receive medicines: that she remained from that time till the 26th of June, 1858; that she thought she did not relate to the respondent before leaving what she had testified Olive said to her in apprehension of death; also that on that Thursday, Olive seemed to be sinking, and about four o'clock that morning kicked off the foot board of her bedstead; that her sister called her and Mrs. Green into the room, and that Olive then complained of being tired, and didn't talk much; that witness could not say whether Olive was insane; that the kicking continued but a short time, then she quieted down herself; that Olive began the conversation Thursday noon; that as near as the witness could recollect she said she thought she could not live, felt afraid she could not live, felt as though she had destroyed herself; she didn't say she thought she should die speedily, but that she felt as though she could not recover.

The government introduced Mrs. Greene, as a witness, whose testimony tended to show that she went to the respondent's on Tuesday forenoon, and staid a week on a visit to Mrs. Howard, and that Olive died the next Friday evening; that she first saw Olive on Wednesday forenoon, at the request of her sister, on account of Olive's having the nose bleed; that Olive was lying in bed, her hands trembling, and she couldn't help herself; that she did not seem to take notice of the persons about her, or what they were doing; that the witness saw her again about four o'clock Thursday morning; that she was then crazy and kicking; that she kicked out the foot board and three slats underneath; that they held her on the bed as well as they could, and quieted her; that the witness remained with her till daylight; and that from the time the witness went to the respondent's till Olive's death she did not find her in a condition to be able to converse.

On cross examination she testified that she was in and out of Olive's room through the day of Thursday after leaving her at daylight; that she was crazy all the time; that witness asked her questions; she would not answer the questions that were asked her, but would make broken sentences.

The testimony of Olivia Ashe also tended to show that Olive

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was insane for three or four days before her death. From the evidence bearing upon the subject, the court failed to find that the declarations testified to by Susan Squires, if made as testified to, were made under the apprehension of death. but on the contrary the court were fully satisfied that Olive was in such a condition of mind at the time of the alleged conversation with the witness as to be incapable of any rational apprehension or understanding on any subject. The court, therefore, directed that the testimony of Susan Squires, as to her conversation with Olive, could not be received as showing the *dying* declarations of the latter. To which decision the respondent excepted.

The respondent, on the cross examination of Olivia, asked her as to what she had said to various persons as to the condition, conduct and cause of the death of Olive, and then introduced those persons as witnesses whose testimony tended to show that she had said various things to them inconsistent with the facts to which she testified in this trial,* with a view to discrediting her as a witness.

The respondent introduced medical evidence which tended to show that the signs and indications of pregnancy, and of the delivery of Olive of a child, which the testimony in behalf of the prosecution developed, might be accounted for otherwise than by the fact of pregnancy and delivery of a child, and that the appearances about the neck of the womb, described by Drs. Frost and Newell, and indicating in their opinion mechanical violence used there, as above stated, might be otherwise accounted for, and might have been the result of diseases, which, with the appearances that might result therefrom, were fully described by the medical witnesses introduced by the respondent; and also that upon the symptoms and appearances developed by Olive, as testified by the witnesses on both sides, if she was in fact pregnant, the child might have been dead in the womb at the time of the first operation by the respondent, as testified to by Olivia Ashe; and also that the death of Olive was not, upon the evidence given, which was proper for a professional witness to consider in forming a professional opinion, satisfactorily made out to have resulted from the procuring of the abortion, as the evidence for the prosecution tended to show.

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Dr. Phelps, one of the medical witnesses, introduced by the respondent, in the course of his examination among other things testified : "From what I've heard testified by Olivia as to what occurred at Dr. Howard's as to operations, pain, symptoms and appearances, I heard no evidence tending to convince me that a living child had been born, excluding her testimony that she saw one. I am not satisfied that a *living* child was born, if a child was born. I saw nothing in her evidence that *convinced* me that there was a living child *in utero* at any time. If a *child* was *in utero* I see no evidence that it was living at the time Dr. H. performed his first operation."

Dr. Allen, a medical witness introduced by the respondent, in the course of his examination testified among other things : "From what I've heard of the testimony of value to a medical man, (as the basis of a professional opinion) I see no positive evidence of the vitality of the *fœtus* at the time it was taken away. It is my opinion it was not then alive. On the same *data* I see no positive evidence of life of the *fœtus* when Dr. H. performed the first operation."

The evidence in the case tended to show that the respondent, at the time of the alleged offence, had resided in and occupied a house in Bradford for about three years ; that prior thereto it had been owned and occupied by Mr. Waterman then deceased, whose widow the respondent married about two years before the alleged offence ; that upon this marriage the respondent controlled and occupied the house and the farm appurtenant till sometime in the summer of 1858, residing and keeping his family there ; that during all the time of his residing there, both before and after his marriage to Mrs. Waterman, many patients were accustomed to resort to him there, both male and female, some of them staying for longer or shorter periods to be professionally treated by him ; and also that he erected an office near to and in connection with the house which he used for professional purposes, to which office was attached a privy, for the use of the office, and not for the use of the family household.

After the defence had rested, the prosecution gave additional evidence for the purpose of rebutting some points of the evidence introduced by the respondent, and of strengthening the case made

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in the opening, and to that end introduced as a witness Agnes Wilson, the mother of the respondent's wife, who testified that at the time of the trial she lived at the house formerly the residence of Dr. Howard and her daughter in Bradford, and had lived there since the 8th or 9th of February, 1858.

At this point a quantity of bloody clothes were exhibited, amongst which were two female *chemises*, a small quilt or pad some two feet wide and three or four feet long, appearing to have been very much besmeared with blood.

The witness then testified that in October or November, 1858, when cleaning house, she found these articles between the rafters in the L part of the house, in the coving, and concealed by a board that was shut in between the rafters; that when she took them out, a black stuff like dry clots of blood sifted off from them; that she had had charge of them ever since; that no member of the family had known about them after she found them; that one of the *chemises* which was exhibited had the appearance of having been removed from the person by cutting.

The government offered to prove by the same witness that within the first fortnight after the respondent's confinement in jail, he having been committed the latter part of May, 1858, as she was passing from the office to the house, she saw one of the respondent's dogs come out from under the office privy, with the form of a child in its mouth; that he dropped it on being ordered by her, and the witness examined it and found it to be a child, in the judgment of the witness, four or five months grown; that it was putrid and decayed; that she had noticed the dogs digging about the privy vault for some time previous till they had worked a hole in the dirt under the plank, out of which hole the dog came with the child in its mouth; that while she was looking at it a large dog belonging to the respondent came up and snatched it away and ran off with it.

To this evidence the respondent objected, but the court admitted it to be given, and the witness testified substantially as above stated, to which the respondent excepted. The witness, in describing the child, pointed out its length and size on her arm, indicating it to be in these respects similar to the child which Olivia Ashe testified she saw taken from her sister.

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In the course of the examination of Olivia Ashe, she testified that while she was at the respondent's she was in his office on the day of her arrival and saw some infants there, one-half dozen perhaps of all sizes, preserved in spirits. No evidence was given by either side to show what had become of them.

The respondent among other things requested the court to charge the jury as follows :

I. That to support the first, second and third counts the government must prove the following facts :

1. That Olive Ashe was pregnant with a *living foetus* at the time the respondent first operated on her. This must be proved beyond all doubt. There must be no speculation on this point. If there is doubt on this point this ends the case.

2. That the respondent, with intent to procure a miscarriage, used some instrument other than his hand to produce the same.

3. That the inserting the speculum for the purpose of an examination of the parts, even if it resulted in an abortion, if there was no intent to procure an abortion, would not be sufficient to sustain the indictment. The jury must find that the respondent used an instrument with intent to procure an abortion. This must also be proved beyond all reasonable doubt.

4. That it must be proved that the respondent had no justifiable cause for the operation. That in order to convict on the first count, the jury must find that Olive Ashe was pregnant with a *living foetus* at the time the respondent performed the first operation.

6. That if the *foetus* was then dead there can be no conviction on this count, even if Olive Ashe died from the effect of the operation from the unskillfulness of the respondent.

6. That it is no offence under the statute to attempt to procure the miscarriage of a woman pregnant with a dead *foetus*.

7. The respondent being a physician, the law implies his innocence as in other cases, and also that he acted in good faith in his profession and in a justifiable manner until the government prove the contrary. And the burthen of proof is on the government to prove this fact beyond all reasonable doubt.

8. That the presumption of innocence overcomes the presumption of the continued life of the *foetus* at the time of the opera-

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tion (if any was performed,) and therefore the government must prove the continued life of the fœtus at the time by other sources of proof than showing the impregnation of the deceased.

9. That if they find that the respondent had reasonable ground for belief that the fœtus was dead, and he acted on that ground of belief, then he cannot be convicted on this count, even if death ensued from his want of skill in performing the operation.

II. That the jury could not convict on either count unless they find a state of facts proved that supported the count and excluded every other reasonable conclusion but that of the guilt of the respondent.

III. That the bloody clothes must be laid out of the case by the jury, as there was no proof put in tending to show that they were ever in the respondent's hands, or that he ever had any knowledge of the same, or that they were ever in the possession or on the person of Olive Ashe, and the government have not attempted to identify the same.

IV. That the testimony of Mrs. Wilson, as to the fœtus, must be laid out of the case, as there was no proof tending to show that the fœtus she saw was the fœtus taken from Olive Ashe, or that the respondent put the same in the privy, or had any agency or knowledge of its being there.

V. That if the jury should find that the respondent was aiding in procuring Olivia Ashe to go to Montreal to prevent her being a witness, that was no proof to show that he committed the acts alleged in this indictment.

That if the jury could find a state of facts consistent with the innocence of the respondent and accounting for the acts proved in this respect, if any were found, then such acts were entitled to no weight. That in order to give any weight to this evidence, they must find, beyond all reasonable doubt, the fact that he did aid in getting her away.

VI. That it was not sufficient to warrant a conviction to prove the fact of an attempt to procure an abortion, or of an abortion having been procured, but that the government must prove affirmatively, beyond all reasonable doubt, facts that prove the want of a justifiable cause in this particular case on trial.

VII. That there was no testimony tending to prove that instru-

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ments were used by the respondent, except the testimony of Olivia Ashe. That as she was an accomplice, the jury could find no fact on her testimony alone ; and that as this point was not proved beyond a reasonable doubt, there could be no conviction.

The court refused so to charge in all respects, but among other things, not excepted to, charged as follows :

As to the three first counts the court charged the jury as requested, except in respect to its being necessary for the government to prove the *fœtus* to have been alive when the first operation was performed as testified to by Olivia. In this respect the court charged the jury that it was necessary for the government to prove beyond a reasonable doubt that Olive Ashe was pregnant with a child at the time the respondent performed the first operation, and that he undertook it with the intent to procure a miscarriage, without lawful justification ; that if he undertook it for the purpose of enabling her to avoid the disgrace of giving birth to a bastard, and not as a matter of medical treatment, having reference to her life or health, it was without lawful justification ; but if he did it as a matter of medical treatment with reference to her life or health, it was with lawful justification, and that he could in no event be found guilty of an offence under the sixth count, unless they should find that the death was the consequence of what he did ; that if he used instruments, aided by his hands, in the manner which the government evidence tended to show, with the intent to procure the miscarriage, and without the lawful justification as above explained, and thereby caused her death, the offence must be complete, whether the *fœtus* with which she was pregnant was dead or alive at the time of his so operating ; on the other hand, if what he thus did was with lawful justification, as above explained, he could not be convicted whether the *fœtus* was dead or alive at the time of his operating.

As to the request marked III. the court charged the jury that if they believed Mrs. Wilson, in the account she gave of the place and condition in which she found the clothes and garments, their being there and in that condition, was a circumstance consistent with the evidence given by the prosecution, as to the manner and attending effects of the attempt by the respondent to procure the alleged miscarriage, and was consistent with the fact

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of a criminal intent on his part in procuring the abortion ; that whether this evidence as a circumstance should have weight, as tending to show the commission of the alleged crime, would depend on the ability of the jury to account for the clothes being there and in that condition, consistently with the innocence of the respondent, taken in connection with the other evidence in the case ; that the fact that the respondent had been previously, as the evidence tended to show, in the occupancy and control of the house, as its occupant and master, and as the evidence tended to show, that he had performed an operation upon Olive Ashe, that would be likely to produce such a condition and appearance of that kind of clothing and articles, and that he performed such operation for the purpose of procuring a miscarriage without lawful justification, this circumstance could not be withdrawn from their consideration, and more particularly in one view presented and claimed by the counsel for the government in the argument, viz : as tending to account for the fact testified by Margaret Kelley, that she did not wash any bloody clothes while the said Olive and Olivia were there at the respondent's, which testimony had been introduced and argued upon the jury, as tending to discredit the evidence of Olivia in regard to the flowing of blood from her sister during and after the second operation of the respondent ; that if from the evidence as to the occupancy of the house prior to the respondent's residing there, and as to the character of his house, as a place of resort for female patients, and the opportunity or motives of others to put and conceal such clothing and articles where those were found, in connection with the fact that there was no direct evidence identifying the two articles of clothing, as belonging to Olive, they could reasonably account for the clothing and articles being there, in the condition in which they were found, and appeared when exhibited, consistently with the other facts and circumstances which they found proved in the case, and consistently with the innocence of the respondent of the crime charged, then the jury should lay this circumstance out of the case, and give it no consideration for any purpose ; if otherwise, they must consider it in connection with the other evidence in the case, and give it such weight, as a circumstance, as they should judge it entitled to.

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As to the subject of the request marked IV. the court in the charge put this piece of evidence to the consideration of the jury upon the principles and views similar to those presented in respect to the request marked III, varying remarks and illustrations in respect to the incidents in which the one differs from the other; and amongst other things, as above stated, the court instructed the jury that as the other evidence tended to show that a *fœtus* of similar size had been taken from Olive by the respondent by forcible means, and the respondent controverted the fact on the ground of discredit thrown upon the only witness who gave direct evidence to this fact, and inasmuch as what was testified by Mrs. Willson in this respect was consistent with the other evidence given by the government tending to sustain the charge in the first three counts in the indictment, and so far as the size and appearance of the child was concerned, was consistent particularly with the testimony of Olivia, and as the respondent had been the owner and in the occupancy and control of the office, house and their appendages from the time of the alleged offence to near the time when the child was seen by the witness, as testified by her, this evidence could not be withdrawn from their consideration; that if they gave full credit to Mrs. Wilson in this respect they would regard the fact as a circumstance in connection with all the other evidence in the case, and if they could reasonably account for the circumstance consistently with the innocence of the respondent, they would lay it out of their consideration for any purpose, otherwise they would consider it in connection with the other direct and circumstantial evidence, and give it such weight as they thought it entitled to.

As to the request marked V. the court charged the jury that the evidence was proper for their consideration as tending to show conduct of the respondent inconsistent with his innocence of the charge, to sustain which Olivia was recognized to appear as a witness before the county court. If they found it proved that the respondent did aid in procuring her to depart from the State for the purpose of preventing her from being used as a witness against him, in the further prosecution of the respondent for the offence charged, they would treat it as a circumstance in connection with the other evidence; that if they could find a

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state of facts consistent with the innocence of the respondent, and accounting for his acts in this respect, consistently with his innocence, then this circumstance would be entitled to no weight as tending to show his guilt.

As to request marked VI. the court charged the jury as requested.

As to the request marked VII. the court charged the jury fully in relation to the law as to the consideration to be given to the testimony of an accomplice, as applicable to Olivia Ashe, in her relation to the subject matter of this prosecution, agreeably to oral requests made to the court by the counsel for the respondent in the course of his argument to the jury, and in conformity with the grounds and views upon which the counsel for the respondent presented her testimony in arguing the same to the jury. The court also instructed the jury that they must be satisfied from the evidence in the case, beyond a reasonable doubt, that the respondent was guilty of the offence charged in the first three counts in the indictment, committed in the manner there charged, or they could not find him guilty on either of such counts; that the only direct evidence of instruments having been used was the testimony of Olivia Ashe, or of an abortion having been attempted or procured by the respondent; that as to the manner in which it was done or attempted, they would consider the evidence given by the medical witnesses for the prosecution tending to show that mechanical violence had been inflicted on the neck of the womb, in connection with the testimony of Olivia, and determine whether she was corroborated thereby in this respect, and if so, whether the evidence bearing on the subject, taken together, satisfied them beyond a reasonable doubt of the truth of the charge as set forth in said counts of the indictment.

The respondent's counsel claimed that the testimony of Margaret Kelley, as to Olivia applying to her for a pail, and what Olivia said to her on that occasion, and the finding of the pail in the morning with the bloody water in it, was evidence not only tending to effect the credit of Olivia, but also was competent evidence tending to show that Olive was then having hemorrhage from the womb.

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The court instructed the jury that it was proper to be considered for the former purpose only.

The court charged the jury fully, and in a manner to which no exception was taken as to the rule of evidence in order to warrant a conviction, as to presumptions of innocence and how they must be overcome by the legitimate force of the evidence of guilt; and amongst other things upon the subject, the court told the jury that by the law the respondent was presumed to be innocent of the crime charged till he was proved, beyond a reasonable doubt, to be guilty; that this presumption extended to every act which the evidence tended to prove had been done by him; that every such act was presumed to have been done innocently and with lawful justification, and such presumption continued and was effectual in favor of the respondent until overcome by affirmative proof, which produced a conviction beyond a reasonable doubt that such acts were criminal.

As to direct and circumstantial evidence, and therein how facts must be proved in order to entitle them to be treated as circumstantial evidence, and the mode in which such evidence is to be treated, weighed and disposed of, amongst other things on this subject, the court told the jury that every fact which was to be regarded as a *circumstance*, and weighed by them as *circumstantial evidence* must be proved beyond a reasonable doubt, before it could be considered by them as evidence; and also that when any circumstance had been thus proved, if they could reasonably account for its existence consistently with the innocence of the respondent, they would lay it out of consideration as tending to show his guilt; that they would take into consideration, and give weight to only such circumstances thus proved as they could not reasonably account for consistently with the respondent's innocence.

The court instructed the jury that if they found the offence charged under the first three counts proved in all respects, and should fail to find that the death of Olive Ashe was the consequence thereof, they would return their verdict for the minor offence, a misdemeanor under the statute. The jury returned a verdict of guilty of the minor offence, under the first three counts,

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and not guilty under the fourth, fifth and sixth counts of the indictment.

To the refusal of the court to charge as requested, and to the charge as above detailed, in those respects in which it differed from such requests, the respondent excepted.

P. T. Washburn and J. A. Wing, for the respondent.

Charles C. Dewey, State's Attorney, for the prosecution.

REDFIELD, Ch. J. The important question in the case is, whether the death of the *fœtus* before the attempt of the respondent to procure the abortion, is material as to his guilt. It is undoubtedly one of considerable practical importance. If we regarded the statute as chiefly intended for the protection of the life of the *fœtus* it would incline us very strongly to the view taken of the case by the respondent's counsel. But it is obvious that there are many other important considerations connected with the offence besides the preservation of the life of the child. The life and health of the mother, and the probability of future offspring are all so seriously put at hazard by such a transaction, when produced by mechanical means, that it is not easy to determine precisely which is the more important purpose of the statute, to prevent the injury to the child or to the mother. Then the evil example of such a practice, and the teaching the mothers, or thus attempting to teach them, the facility with which they may escape the perils of child bearing, and the consequent responsibilities, and the impediments to a life of ease and vicious indulgence, are among the most pernicious consequences of such abominable practices, and are no doubt properly to be regarded as fairly coming within the evils to be considered in fixing the construction of the statute and its probable object and purpose. We cannot, therefore, regard the continued life of the *fœtus* as essential to the perpetration of the offence, with reference to its general character.

But undoubtedly the terms of the statute, where they define the offence, are to have a controlling effect in the matter. It would certainly not be allowable, in a case of this highly penal character, to give the statute an operation, with reference to its

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general purpose, beyond the clear import of its terms. And if the statute does in terms require the continued life of the *fœtus* at the time of committing the offence, however unimportant it may seem to us, it must be proved in order to insure a legal conviction.

The statute does specifically require that the woman should be with child at the time of committing the offence. We could not then adopt the view which was attempted with reference to Lord ELLENBOROUGH's Act, 43 GEO. III, chap. 58, that it was not important whether the woman were with child or not; LAWRENCE, J., in *Rex v. Phillips*, 3 Camp. 76. But this view seems not to have finally prevailed in regard to the English statute. For in *Rex v. Scudder*, 3 C. & P. 605, it was held that the woman must be with child in order to insure a conviction under the 43 GEO. III, C. 58. But under the present English statute, 1 VIC. C. 85, sec. 8, and 14 and 15 VIC. C. 100, sec. 9, that fact does not seem to be held essential to the conviction. *Rex v. Goodchild*, 2 Cur. & Kir. 293; S. C., affirmed by the fifteen judges, *id.* But under our statute it is expressly required, to constitute the offence, that the attempt be to procure the miscarriage of a woman "then pregnant with child." This last clause is omitted in the present English statute, which is the only difference between that statute and our own. This is the only fact required to be shown under our statute beyond what is required under the English statute, and we infer that this portion of the statute of this State has been introduced purposely, *de industria*.

The "miscarriage" is required under the English statute. And if the term "miscarriage" may properly be predicated of a woman not with child, as the English courts held, it may surely be *a multo fortiori* of one where the *fœtus* is not in life, or has died, or been killed. So that the only new question arising under our statute is, whether it is essential to the pregnancy, or being "pregnant with child," that the child should be still alive. It is not claimed that it is necessary the embryo should have quickened. The general form of expression "pregnant with child," seems to have been used to escape all question of this kind and have it clearly apply to every stage of pregnancy, from the earliest conception; and if so, we see no reason why it should not extend

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through its entire term, until the actual expulsion of the *fœtus*. For it will not be claimed that, strictly speaking, the pregnancy ceases until this event. We think, therefore, that there is no good ground to claim that the mother, after conception, ceases to be pregnant with the child until its actual expulsion from the uterus.

There are, unquestionably, many cases of pregnancy where it becomes matter of certainty that the *fœtus* cannot come to maturity, or to birth, without the destruction of either the mother or the child, and sometimes of both. But we do not apprehend that one who should attempt unlawfully to procure an abortion in such a case, for instance, without being aware of these embarrassments in the case, is to be acquitted of the attempt to commit a crime, because thereafter it might have become necessary for the surgeon, in the course of legitimate practice, to destroy the *fœtus*.

It would seem probable that this general form of expression, "pregnant with child," was used in order to escape all such refinement about the probable injury, either to mother or child. The statute evidently intends to discriminate between the lawful operation of the medical man, in the due course of his legitimate practice in such cases, when it becomes imminently perilous to delay longer to interfere with the due processes of natural growth, and that voluntary interference in such matters which is prompted by no such motive, but originates in a reckless disregard and defiance of the laws of nature, in order to procure an abnormal exemption from those natural results flowing from illicit or unbecoming indulgence, which the law therefore reprobates.

We think, therefore, that it cannot, with plausibility even, be maintained that the continued life of the *fœtus* is indispensable to the commission of the offence. Most of the vicious purpose and motive for its perpetration, in the majority of cases, still remains; all indeed, or nearly all, to which we have before alluded, if we except the chance of the birth and maturity of a responsible and useful human being, which must indeed be recognized as a very important consideration, although attended with many contingencies and uncertainties, and by no means, in itself, so important as many other consequences directly and incidentally connected with such unlawful and degrading practices.

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There is, indeed, a certain degree of plausibility in the argument attempted to be deduced from the literal import of the term "miscarriage." The compound nature of the word seems to imply a departure from the natural course of gestation, and the consequent destruction of the *fœtus*. But the word has not received any such construction in the English courts. It is not so understood, either legally, or medically, or popularly. We cannot, therefore, suppose it was intended by the framers of this statute to be so received. Medically, this term is strictly applied to the expulsion of the embryo during the first six weeks after conception. Legally and popularly, I apprehend, this term applies to the expulsion of the *fœtus* at any time during the period of gestation. And although, in the majority of instances, it occurs in consequence of the destruction of the life of the *fœtus*, where otherwise it would have been born alive, this is not of the essence of the act any more than the life of the child is necessary to a birth. And it cannot be questioned that a child, brought into the world in the course of nature without life, but at the end of the full period of gestation, may properly enough be said to be born, or still born, or born dead, and that this form of expression is strictly accurate, both in legal and popular language.

We cannot, therefore, regard the term "miscarriage" as necessarily implying the continued life of the *fœtus*. And we do not understand that it is claimed the respondent did not have the full benefit of any presumption or proof in the case, that he might have acted professionally. This view, although put to the jury in form, does not seem, from the general course of the evidence as detailed, to have been a view which was or could have been much insisted upon. It seems highly improbable from the general course of the trial, that if the *fœtus* was in fact dead, it could have been so understood at the time, either by the mother or the respondent. We can scarcely suppose the respondent so utterly ignorant upon the subject as not to have understood that if such was the fact the expulsion must inevitably occur very shortly, in the due course of nature.

The case, upon the most favorable view for the respondent, was one where the respondent believed it to be necessary to use mechanical means to procure a miscarriage, and therefore did use

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them with that view, and in a way calculated to destroy the *fœtus* and thereby did attempt to procure a miscarriage at an earlier period than it would otherwise have occurred, the *fœtus* being at the time dead, without his knowledge or suspicion. And upon this latter fact being subsequently discovered, the respondent asks for an acquittal upon the ground that he seriously contemplated the commission of the offence, and attempted it, but that it was in fact impossible at the time, the woman not being with child, because the child was dead. We cannot adopt this view of the case. We think the mother is with child, whether the child be dead or alive, until the actual miscarriage by the expulsion of the *fœtus*. We are aware that some of the text writers upon medical jurisprudence speak of the "procuring a miscarriage" as the premature destruction of the *fœtus*. This being the mode by which a miscarriage is produced, it may, by a figure of speech, be put for the thing itself in a loose mode of speech. But in careful language we always discriminate between the cause and the consequence. The miscarriage itself is nothing more than the premature expulsion of the *fœtus*, and so the text writers generally speak of it, unless under a figure. The death of the *fœtus* is no more the actual miscarriage than the maturity of the child is the actual birth. Either consequence must follow, and is therefore not identical with its corresponding antecedent.

In regard to the exceptions taken at the course of the trial, we shall but briefly allude to the grounds upon which we think they should now be overruled. The most important consideration to be borne in mind in revising so extended and complicated a trial, is that it should not be set aside unless upon grounds reasonably satisfactory, since, in a court of error, all fair presumptions are to be made in favor of the judgment below.

I. The extent to which the testimony of Olivia Ashe was required to be corroborated, is all that could reasonably be demanded. The corroboration must be upon points where the testimony was material to the conviction, and to such an extent, as upon the whole case to leave it satisfactory to the minds of the jury, to the same extent as would be affected by the testimony of a credible witness. We think the charge must have been so understood, and that the proof detailed did tend to show such corrobora-

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tion. We do not think the court is required to be more specific; 1 Greenleaf's Ev. sec. 381.

II. The declarations of Olive Ashe, as to the purpose of the journey in going to the respondent's, were properly admitted as part of the *res gesta*. The mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act.

III. The declarations of Olive Ashe, offered as dying declarations, were properly rejected, and as they were only admissible in regard to the count for manslaughter, where there was an acquittal, the question has now become immaterial, except in the event of a new trial; *Rex v. Mead*, 2 B. & C. 605; 1 Greenl. Ev. sec. 156. So, too, the judge having decided they were not so made as to be admissible as evidence, his decision is conclusive; 1 Greenl. Ev. sec. 160; *King v. Woodstock*, 2' Leach Cr. Cases, 563.

IV. The testimony of Margaret Kelly seems too equivocal to be received as evidence, and if it had any possible tendency to show the fact claimed, it certainly was merely conjectural, and not of that obvious character which is required to make circumstantial evidence, and especially that which depends upon transactions of this remote and uncertain character, admissible. The admission of all the facts claimed as inferences from her testimony, may be explained upon grounds entirely consistent with the theory of the prosecution. The blood found in the pail, if it were admitted to have come from the person of the deceased, is no certain indication of an incipient micarriage.

V. The declarations of Olive Ashe, soon after her arrival at the respondent's, as to her feelings and the state of her health, were admissible to prove these facts, if they became material in the case. The present state of health or feeling is always allowed to be proved in this way, since it is the only mode in which it can be shown; Greenl. Ev. sec. 102; *Aveson v. Lord Kinnaird*, 6 East 188; *Gray v. Young*, 4 McCord 38; *Gilchrist v. Bale*, 8 Watts 355.

But it is not very apparent how the state of Olive Ashe's health or feelings, at the time she came to the respondent's, became

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important in the course the trial took. If the life of the *fœtus* at that time were a question involved, the state of health of the mother would have some bearing on the question. But that question being here ruled unimportant, it seems to deprive the testimony offered in regard to the declarations of Olive Ashe, of all significance. For it would seem from the requests to charge, and what is said in the charge, that the respondent's counsel did not make the distinct question before the jury, whether the respondent acted professionally in good faith in what he did. And if this question had been made, the only declarations offered which could have had any possible bearing upon it, are that she was "very sick and very much fatigued." The fatigue is sufficiently accounted for by the journey she had just taken, and is not, therefore, any evidence that she was, or claimed to be, in any unnatural state. And the expression, "was very sick," does not point to any such definite state of health requiring the species of professional assistance implied in this feature of the defence, as fairly to justify the court in according a new trial upon the ground of the rejection of this evidence. The uncertainty whether the testimony might not have some bearing in the case, would probably have induced me, had I been trying the case, to admit it, as the safer course. But being rejected, we must now be able to see that the respondent has suffered in his defence on that account, or we cannot reverse the judgment. This we do not regard as sufficiently obvious to warrant a new trial. We believe, from all we can learn in regard to the course of the defence, that this portion of the evidence was only relied upon in regard to the life of the *fœtus*, and if admitted could have had no sensible bearing upon any other question.

VI. The *fœtus* found secreted about the buildings was certainly a most unusual and most significant fact, and one tending very strongly to show the *corpus delicti*. The discovery could only be accounted for upon the theory that some one had committed an offence of the character charged in the indictment, in the immediate neighborhood. And the history of criminal jurisprudence shows very clearly that human bones, and other remains of the human body, found secreted about the buildings occupied by the prisoner about the time of an alleged murder, are always

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received to prove the *corpus delicti*, and also as tending, in some degree, to identify the guilty party. This testimony undoubtedly did tend very considerably to corroborate Olivia in her account of the transaction. And it is only by supposing that some other person did commit a similar offence about the same time and place, or else that the respondent had committed other similar offences then and there, that we can give any satisfactory explanation of these discoveries, without regarding them as most convincing proof, not only of the *corpus delicti*, but of the guilt of the respondent.

We think, too, that the general rule which the county court laid down to the jury, in regard to the proper weight of circumstantial evidence, was unexceptionable, and that the detail of the charge upon this particular point was sufficiently guarded, and although it is still possible the jury may have misapprehended the charge, and thus have given this portion of the evidence a more controlling effect than was intended, or was proper, we do not feel so assured of this as to justify a new trial. And finally, although I have felt some hesitation in regard to these two last points, they are so unimportant in themselves, in comparison with the other parts of the case, and the general course of the trial was so well guarded, and there being no reliable ground of belief that any departure from the strictest rules of law did occur, I feel content to overrule the exceptions upon all the points. But in doing so, to prevent misconstruction, we may be justified in saying that a more liberal and charitable view in the admission of evidence, and the construction of the respondent's conduct, when it can be rationally maintained, is generally to be desired in criminal trials. But some cases will occur where such a view is difficult to be supported, and where it is obvious that all efforts at exculpation are but a struggle against the most embarrassing probabilities. In a case of this latter character, a court of error should not award a new trial when it is obvious from the detail of the evidence that it could be of no avail towards an acquittal, and that the trial had been fair, and patient, and satisfactory, and no obvious errors in law had occurred.

Exceptions overruled, and respondent sentenced to the State prison.

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JOHN W. MELLEN v. CALEB THOMPSON AND JOSEPH L. THOMPSON.

Trespass. Pleading.

The plea of *son assault demesne* is a sufficient answer to a declaration in trespass for assault and battery, though the declaration contain averments of personal injuries to the plaintiff, showing the assault to have been of a very aggravated character.

The question whether the defendant used an excess of force in his own defence, is in general to be determined only upon the evidence; and this issue is raised by the replication of *de injuria*.

In trespass for a simple assault and battery, a plea is sufficient which alleges that the defendant *molliter manus imposuit*, etc., in his reasonable efforts to prevent the plaintiff from breaking the peace by an assault upon a third person; but *aliter*, when the declaration alleges extraordinary or aggravated force on the part of the defendant.

TRESPASS for assault and battery. The declaration, in addition to the usual charge of an assault and battery, charged that the defendants struck the plaintiff a violent blow upon the left side of his head, and knocked him down; that one of the defendants held the plaintiff's hands, and that the other, while the plaintiff's hands were so held, kicked him in the side and breast and with great violence placed his knees upon the plaintiff's breast and choked him, and in other respects so injured him as to endanger his life. Each of the defendants pleaded the general issue, and *son assault demesne*, and the defendant, Caleb Thompson, also pleaded that the plaintiff made an assault upon the other defendant, being his brother, and that the defendant Caleb Thompson in defending his brother from such assault, did necessarily a little, beat, bruise, etc., the plaintiff, etc., etc.

The plaintiff demurred generally to the defendants' special pleas, but the county court, in Washington county,—BARRETT, J., presiding,—adjudged the pleas sufficient, and rendered judgment for the defendants, to which the plaintiff excepted.

J. A. Wing and William P. Briggs, for the plaintiff.

Dillingham & Durant, for the defendants.

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POLAND, J. The plaintiff's declaration sets forth a very aggravated assault and battery of the plaintiff by the defendants, and not only charges the defendants with cruelly beating the plaintiff, but also with kicking and choking him. The case of *Hathaway v. Rice*, 19 Vt. 102, decides that such allegations in a declaration for an assault and battery, are not to be regarded merely as matter in aggravation of the assault and battery complained of, and therefore covered and answered by any plea which would be a good answer to a simple charge of that kind; but that they are to be understood as substantive allegations of various acts of trespass to the person of the plaintiff, and that any plea which admits the whole declaration, and professes to justify all that is charged in it, must contain sufficient to apparently justify the defendant for all the declaration alleges. The defendants' pleas in this case admit all the allegations in the declaration and profess to justify the whole.

Does either of the pleas present a good legal answer to it? We think each defendant's first plea, that the plaintiff made the first assault, and justifying his assault and battery of the plaintiff in self defence, is a good answer to the whole declaration. The amount and kind of force which the law authorizes one to use in defence of his own person, depends entirely upon the extent and character of the attack upon him, and all the attending circumstances. He may use such kind and amount as is necessary for his own protection and safety, even to destroying the life of his assailant. If it were necessary for a defendant pleading such defence to set forth all the particulars of the plaintiff's prior assault, and all the various circumstances under which it was made, and which might in evidence affect his right to repel it, and to what extent, it would become next to impossible to frame such a plea, and ordinarily it would by no means enable the court to determine upon the face of the pleadings, whether or not, the force used by the defendant was justified by the first assault made by the plaintiff.

As was said by ROYCE, Ch. J., in *Hathaway v. Rice*, "whether an excess of force has been used, can in general be determined only by evidence on trial."

It is not therefore required in such a plea that the defendant

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should minutely detail the circumstances of the plaintiff's first assault, but in order to make the plea a good answer, it is required that the defendant should allege that he used no unnecessary force in repelling or defending himself from the plaintiff's attack.

It was formerly held in England, that when the plaintiff relied on showing that the defendant had used excessive or unreasonable force, he must reply it, or new assign it, to the defendants' plea of *son assault*, and that he could not recover for the excess under the general replication *de injuria*.

But it is now settled, that the plaintiff in such a case need not reply the excess, but may show it, and recover for it under the replication *de injuria*; in short, that such replication not only puts in issue the fact whether the plaintiff made the first assault, but also whether the defendant used more force than was necessary to defend himself from it; see *Elliot v. Kilburn*, 2 Vt.; *Resce v. Taylor*, 1 Har. 15; 1 Ch. Pl. 593, note E.; *Harman v. Edes*, 15 Mass. 347.

This rule in relation to pleas of this character is very favorable to the plaintiff, as it enables him on trial to contest both points before the jury, and to recover, if either be found in his favor, instead of being required to hazard his case upon a single point alone, the result usually obtained by pleading specially.

We have been cited to no case or precedent where this general form of plea of *son assault* has been disallowed or departed from, in consequence of the aggravated nature of the injury set up in the declaration, and we think none can be found; see 3 Vol. Ch. Pl. 1068, note R., and cases therein cited.

The plaintiff insists that each defendant's second plea is bad, because the law does not justify one in using force in defence of a brother against an unlawful attack.

It is laid down in the elementary books that a battery may be justified by one in defence of a husband or wife, parent or child, master or servant, but in none that I have examined is it said that it may be in defence of a brother. But it is also said by all the elementary writers, that it is a good defence to an action for an assault and battery, that it was committed to prevent a breach of the peace. We are not prepared to say that a man is any

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better justified by law in forcibly defending his brother against an unlawful attack, than he would be in defence of a stranger ; but we think that every man is legally justified in the reasonable use of force for the prevention of unlawful violence to another's person, and thus preventing a breach of the peace.

We should regard this plea, therefore, as a good answer to the plaintiff's declaration, if it were merely for a simple assault and battery. Whether it is a good answer to this, which substantially alleges an aggravated injury and wounding of the plaintiff, depends upon the determination of the class of pleas to which this belongs. It is laid down in many cases, several of which are cited by the plaintiff, that a plea of *molliter manus imposuit* is never a good answer to a declaration alleging a wounding of the plaintiff. In this class of pleas are included justifications in defence of property, real or personal, the removal of a person unlawfully upon the premises, or in the house of the defendant, arrests under process, etc. Very similar in principle are pleas in justification of moderate correction of an apprentice or pupil. None of these pleas, in the usual and general form, are a good answer to a declaration alleging extraordinary or aggravated force and violence, for the good reason that the right which the defendant sets up does not primarily authorize, nor its exercise require, anything more than gentle, moderate force. The plea only shows a right to use gentle and moderate force, while it admits the declaration to be true which charges an immoderate and aggravated use of it.

If the plaintiff forcibly resisted the defendant in this exercise of his right, whereby it became necessary, and the defendant became entitled, to use more than moderate or gentle force to assert and enforce his right, this also must be set forth in the plea, and when this is done, the plea becomes analogous to the plea of *son assault*, and it is not necessary to set forth minutely, or particularly, the nature and extent of the force used by the plaintiff, to make the plea a sufficient answer to the declaration. We think this plea of the defendant can only be regarded as a plea of *molliter manus*, and not a plea of *son assault*.

If the plaintiff was making an assault, or was about to commit a battery upon the defendant's brother, the defendant would

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have the right to use gentle and moderate force to restrain him. If the plaintiff thereupon desisted, this was the extent to which the defendant had a right to use force at all. If the plaintiff persisted in his attack, and resisted the defendant's efforts to prevent him, or if he then attacked the defendant, whereby it became necessary for him to use more force, either for the safety and protection of his brother or himself, this should have been alleged in the plea. This not being alleged, we think this plea does not properly answer the plaintiff's declaration. Mr. Chitty, in his *Precedents*, 3 Vol. Ch. Pl. 1071, gives a form of such plea in accordance with these views.

The first plea in bar of each defendant being sufficient, the judgment below on the demurrer for the defendant was correct, and is affirmed.

THE TOWN OF BROWNINGTON v. THE TOWN OF CHARLESTON.*Pauper.*

In order to sustain a proceeding for the removal of a pauper, he must have gone to the town, asking for the removal, with the intention of remaining there, or have formed that intention after arriving there. If such be not the case, the remedy is an action of assumpsit for the support of the pauper, as a transient person, under sec. 16, chap. XVIII, p. 133 Comp. Stat.*

The town of C. being chargeable for the support of a pauper, upon the removal of the person with whom the pauper resided, from C. to the town of B., contracted with such person to support the pauper in B. for a certain time; and under this agreement the pauper removed from C. to B. with such person; *Held*, that neither such a removal under the circumstances, nor the fact that the pauper had remained in B. for about ten months after the time for which the town of C. agreed to support him there, constituted such a *going to B. to reside*, as would sustain an application by that town for an order of removal,

* NOTE.—A person *non-compos* can not be said to go to a town to reside, so that an application for his removal can be sustained. He is to be regarded merely as a transient person in any other town than that in which he has his legal settlement; *Ryegate v. Wardsboro*, Caledonia County Supreme Court, 1837, not reported.—REPORTER.

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it appearing that the pauper remained there through inability, on account of poverty, to leave; but that the proper remedy was an action of assumpsit by B. against C. for the expenses of the pauper's support as a transient person.

ASSUMPSIT to recover expenses incurred for the support of one Joseph Burrows, a pauper. Plea the general issue and trial by the court in Orleans county, at the June Term, 1858,—POLAND, J., presiding. The following facts were found by the court :

The legal settlement of the pauper was in Charleston, and that town had aided him occasionally prior to November, 1855, for a year previous to which time he had been residing with his son, Hiram Burrows, in Charleston. On the first of November, 1855, Hiram Burrows removed from Charleston to Brownington to reside, and notified the authorities of Charleston that they must take care of his father. In reply to this notice the selectmen of Charleston requested him to remove his father to Brownington with him and to keep him there till the next spring, and promised to pay him fifty dollars for so doing. Hiram Burrows accordingly removed his father, his father's wife and one child to Brownington, and they lived there by themselves in a house belonging to Hiram, by whom they were mainly supported during the winter.

About the first of March, 1856, the overseer of Charleston settled up with Hiram Burrows for his father's support and told him he must make a new contract with the new overseer. After this the town of Charleston refused to furnish any further aid or support for Joseph Burrows, though several times applied to by him after the first of March, and he, with his wife and child, continued to live in the house of Hiram Burrows, where he had lived, and did something toward the support of his family by making baskets, and had a small garden, the residue of his support being furnished by his son Hiram and the charity of the neighbors. He continued to live in this way until January, 1857, when application was made to the town of Brownington for aid, and they furnished the supplies now sought to be recovered, being about seventeen dollars, which were needed and reasonable. Upon the above facts the court adjudged that the plaintiffs were entitled to recover, to which the defendant excepted.

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J. E. Dickerman, for the defendant.

Timothy P. Redfield, for the plaintiff.

ALDIS, J. The town of Charleston is liable for the support of the pauper, Burrows. But Burrows, being in Brownington, called on that town for support. Upon this case Brownington had to decide which one of two courses to adopt. First, if the pauper had come to reside in Brownington, these proceedings must be had under the statute to obtain an order of removal, and without such a proceeding nothing could be recovered of Charleston for the expense of supporting the pauper. But if Burrows had not "come to reside" in Brownington, if he was only a transient person there, then the proper course would be, not to proceed for an order of removal, but to furnish the pauper a support, and sue and recover therefor of Charleston in assumpsit. The plaintiff decided to pursue the latter course and hence this action. The right to recover depends upon the pauper's being a transient person; if he had *come to reside* in Brownington there can be no recovery in this suit.

The question whether a pauper has come to reside in a town is one of fact. Two things are necessary to show such a residence; first, he must have come to the town *actually*, not by mere intention or constructively; secondly, he must have come there *animo manendi*, or being there he must intend to remain there, and must have abandoned all intention of returning to the town whence he came. Hence the intention, whether of remaining or of returning, gives character to the actual tarrying in the place, and determines whether it is or is not residence. This intention is ascertained by evidence of the attending circumstances and of the acts and declarations of the party. In the case at bar the court has set forth in the bill of exceptions the acts of the pauper and the circumstances under which he came to and stayed in Brownington, and upon these facts has decided the plaintiff can recover, or what is the same thing that the pauper did not come to reside in Brownington. If the evidence tended to show this, this court cannot say there was error in the decision.

I. Of the original coming of the pauper to Brownington. This was by a removal of the pauper by the direction of the

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defendant town to Brownington, upon an agreement to support him till the first of the then next March. He was removed in November. He remained in Brownington till the first of March supported by Charleston. Up to this time it is clear that the removal and the remaining of the pauper in Brownington was in no proper sense a residence in Brownington or a coming to reside there. It was a stay there ostensibly for a temporary purpose, viz., to live with his son at Charleston's expense till the first of March. It was not a voluntary removal by the pauper, but a necessity to go where Charleston would furnish him a support. It showed no intent to remain in Brownington and to abandon Charleston, but on the contrary, the mere animal instinct to cling to his support where he could get it. Such a removal and residence under it are analogous to the residence of a person imprisoned, and are not in a legal sense residence, but only the stay of a transient person; *Manchester v. Rupert*, 6 Vt. 291; *Danville v. Putney*, 6 Vt. 512. It was on a similar principle that this court held in *Ryegate v. Wardsboro*, decided in 1857, but not reported, that fourteen years' residence of one *non compos* did not make a residence, because the *intent*, the *animus manendi* could not be predicated of such a person. Till the first of March there was nothing tending to show an intent of any kind on the part of the pauper. Others intended for him and controlled his residence. There was nothing to prove that he did not intend to return to Charleston, or that he did intend to reside in Brownington; *Woodstock v. Hartland*, 21 Vt. 563; *Sutton v. Cabot*, 19 Vt. 522, illustrate how coercion or necessity, by taking away the intention of remaining, take away from residence the essential element of its existence as a legal residence under the statute.

II. It is claimed that the residence of the pauper from March to January, and the attending circumstances show a legal residence.

The living in a house by himself and contributing somewhat to his own support, and staying the length of time he did were circumstances tending to show an intent to reside there. But we cannot deem them conclusive. There were other circumstances tending to explain his stay, and to show that it was in part from a necessity growing out of his poverty and the misconduct of the defendant, and in part that the intent to return to Charleston

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always existed, and was never abandoned, and failed to be put into action through the wrongful acts of the defendant.

The overseer of Charleston about the first of March told the son he must make a new contract for the support of his father with the new overseer. This may have prolonged his stay. So the inability of the pauper from poverty to return, his risk of suffering in going back to a town that refused to support him, his having no home or place in Charleston to go to for even a temporary shelter, connected with the character of his original removal, these tended to explain his remaining in Brownington as being from necessity, not choice or intention. So his frequent applications to Charleston for support showed the *animus reverendi* to still exist. He clung to all the home he had, the legal liability of Charleston to support him. He did something towards returning there, for by asking their aid he indicated a willingness to go where it was usually furnished, and where only the town was bound to furnish it, viz., within their limits. Had there been no evidence that the residence was temporary, by necessity, and with the intention to return, then it would have been error in the county court to have given judgment for the plaintiff. But as the evidence, taking the view the most favorable to the defendant, was at least conflicting on the point, we cannot hold it error that the court below drew an inference from the evidence which it legally tended to prove.

Judgment affirmed.

SAMUEL HOWE v. THE TOWN OF ROYALTON.*Pauper.*

A declaration in assumpsit counting upon the neglect of a town to provide for the support of a transient poor person, brought by the person supporting him against the town in which he is found, in accordance with section 16, chap. XVIII, p. 133, Comp. Stat., is not supported by proof that the town, on being requested to provide for such transient person's support, expressly promised to do so, but afterwards failed to perform such promise.

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The declaration in this case held to count upon the statute liability of the town to neglect to provide for a transient person's support, and not upon the breach of an express promise to do so.

ASSUMPSIT. The declaration contained two counts, which were as follows :

" In a plea of the case for that, heretofore, to wit, on or about the first day of October, 1853, one Stephen Blaisdell, a transient person, was suddenly taken sick and disabled, and confined at the house of the plaintiff, in said Royalton, and was in need of relief, and so continued to be sick and disabled and in need of relief at said house for a long space of time, to wit, for the space of five months next following, at the end of which time he died ; and the plaintiff avers that on or about the first day of October, aforesaid, the plaintiff represented to one Daniel Rix, who was then the overseer of the poor of said town of Royalton, the situation of the said Blaisdell, as aforesaid, and the said Rix was duly informed of the same ; yet he wholly neglected to provide for the support of the said Blaisdell, and, consequently, the plaintiff provided for and furnished the support of the said Blaisdell, and supported him during all the time aforesaid, and in so supporting him expended a large sum of money, to wit, ninety-five dollars, and bestowed much care, attention, and labor of himself and family and nurses in and about the support of the said Blaisdell, whereby the said town of Royalton became liable to pay the plaintiff all the expenses aforesaid, to wit, the sum of ninety-five dollars ; and in consideration thereof, afterwards, to wit, on the 6th day of March, 1854, promised the plaintiff to pay him the same sum on demand ; yet, though often requested, the said town of Royalton have never paid the same, but hitherto have neglected and refused so to do ;

Also for that the said town of Royalton, on the first day of October, 1854, at said Royalton, were indebted to the plaintiff in the sum of ninety-eight dollars, for so much money laid out before that time in the support of one Stephen Blaisdell, (a transient person who was suddenly taken sick and disabled, and was in need of relief at the house of the plaintiff on or about the first day of October, 1853, and of whose said situation the overseer of the poor of said town of Royalton, to wit, one Daniel Rix,

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was then and there duly notified and informed and his situation was then and there duly represented to said overseer of the poor, who nevertheless neglected to provide for the support of said Blaisdell.) and for work and labor, care and diligence applied and bestowed by the plaintiff in and about the support of the said Blaisdell, and being so indebted, the said town of Royalton then and there promised the plaintiff to pay him said last mentioned sum on demand; yet, though often requested, the defendants have never paid the same, but have hitherto neglected and refused so to do.

The defendant pleaded the general issue, and the cause was tried by the jury, at the December Term, 1857, in Windsor county,—REDFIELD, Ch. J., presiding.

On trial the plaintiff gave evidence tending to show that in October, 1853, one Stephen Blaisdell, a transient person, was taken sick at his house in Royalton, and continued sick and wholly unable to do anything for his support or maintenance until his death, on the 1st of February following, and that he was destitute of property; that the plaintiff applied to Daniel Rix, the overseer of the poor of Royalton, and informed him of those facts, and requested him to take charge of and support Blaisdell, informing him at the same time that Blaisdell wanted a doctor; that the overseer told Blaisdell to procure a doctor and take care of him as he would of one of his own family, and that he, Rix, would go and see the person who had contracted to support the town paupers, and send him to look after the matter; that the plaintiff continued to support Blaisdell till he died, for the expenses of which he claimed to recover.

The only question of law reserved in the case was whether the plaintiff, under this state of the proof, could recover under his declaration.

The court decided, and so charged the jury, that the declaration was sufficient to entitle the plaintiff to recover, if the jury believed the plaintiff's testimony, whether they found an express undertaking on the part of the town, or the overseer, to pay for Blaisdell's support, or only a neglect to support and maintain him after due notice and request from the plaintiff so to do.

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To the charge of the court in this respect the defendants excepted.

D. C. Denison and A. P. Hunton, for the defendants.

J. L. Marcy and Converse & French, for the plaintiff.

ALDIS, J. This is a declaration in two counts. The first states that a transient person was suddenly taken sick and was in need of relief at the plaintiff's house; that the plaintiff notified the overseer of the poor of Royalton of the situation of the pauper, and that the town neglected to provide for him, whereby the town became liable to the plaintiff for the support furnished by him to the pauper. This count states the very facts which make the town chargeable under the 16th section of the act for the support and removal of paupers. It is therefore a declaration founded upon the statute. To sustain it by proof it is necessary to show that the town, being notified, *neglected* to provide for the poor person. Upon being notified the town became liable for the support of the pauper, and thereupon might neglect to provide, and so become liable under the statute to the plaintiff, or might promise the plaintiff to pay him for such support, in which case the town would be liable to the plaintiff, not by virtue of the statute, but upon their promise. If upon notice the town provide the support by agreeing with the plaintiff to furnish it, and to pay him for it, they do not *neglect* to provide, but do provide the support through the plaintiff. These two grounds of liability are thus wholly different, the one standing upon an express contract between the parties, the other upon neglect and the implied promise growing out of it.

A declaration counting upon the neglect requires proof of the neglect, and cannot be supported by proof of an express promise made at the time of the application.

The court charged the jury that in this case the plaintiff might recover by showing either neglect or an express promise. The jury, therefore, may have found either alone; the case shows there was evidence tending to show both.

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If they found an express promise but no neglect, the plaintiff could not recover upon the first count.

This leads to the inquiry whether the second count is also a count upon the statute liability, or upon the express promise. This must be determined by the structure and substance of the count itself: It does not contain, like the first count, an affirmative averment of the facts required by statute to make the town chargeable; but like a common count in *indebitatus assumpsit* it sets forth that the defendant was indebted to the plaintiff for money paid, etc., and being so indebted promised to pay. So far it is like the form of a common count. On the other hand it does not aver, as in the usual form, that the money was paid "for the use of the defendants, and at their request;" but avers that it was paid for the use of one Blaisdell, a transient person, and then proceeds to state all the facts which are requisite under the statute to charge the town, *including* an averment that the town neglected to provide for such person, and then says, "being so indebted the defendants promised to pay."

Now the averment of these facts, this full and in a common count unnecessary statement of all the circumstances required to create the statute liability, is inconsistent with both the form and substance of a common count. The averment of neglect is wholly inconsistent with a declaration in general *assumpsit*. We think it cannot, without violence to the established forms of pleading, be called a common count.

Is it a special count under which an express promise made at the time of the notice can be proved? Here again, the allegation of neglect is inconsistent with the proof of *such* express promise, for as we have already said, an express promise made at the time and upon the faith of which the support was furnished, excludes the idea of neglect.

It may unquestionably be treated as a count stating a liability under the statute arising from neglect, and that in consideration thereof the defendants *afterwards* promised to pay the plaintiff for services rendered and for which they were liable, and proof of these facts and a *subsequent* promise would sustain the declaration. The difficulty in this view of the case is that there was no evidence tending to show a subsequent promise. Hence,

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though we may well hold that the count is precisely such a count, yet there is a fatal variance between the proof and the declaration.

If the allegation of neglect were stricken from the count, then it would probably be sufficient, at least after verdict, as declaring upon an express promise made at the time of the notice. But we think the allegation of neglect cannot be treated as surplusage. It is the very fact which changes the liability from contract to statutory obligation. It changes the character of the proof and the nature of the issue. Upon such a declaration the defendants would have no reason to expect that proof of an express promise at the time of the notice would be offered. They would be prepared only to disprove the facts showing that they were chargeable by statute, or that they had made a subsequent promise.

We have therefore come to the conclusion, we may say we have reluctantly come to the conclusion, that there was error in the charge of the court in holding that proof of an express promise made at the time of the application would sustain the declaration.

Judgment reversed.

THE CONNECTICUT & PASSUMPSIC RIVERS RAILROAD CO.,
Appellee, v. JOSEPH BATES, 2d, Appellant.

Justice of the Peace. Appeal.

The defendant subscribed for one share of the plaintiff's stock, and thereby contracted to pay the plaintiffs one hundred dollars in ten equal instalments, no part to be payable till the performance of a condition precedent. In an action before a justice of the peace, the declaration set forth this contract, averred performance of the condition, and claimed to recover the first instalment under an *ad damnum* of ten dollars; *Held*, that the action was appealable.

ASSUMPSIT. The declaration set forth that in consideration that the plaintiff promised the defendant to extend its railroad

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from St. Johnsbury to the north line of this State, in the town of Derby, the defendant made the following written promise to the plaintiff, viz :

“ Connecticut & Passumpsic Rivers Railroad Company. Whereas the Connecticut & Passumpsic Rivers Railroad Company propose to extend said road from St. Johnsbury to the town of Derby, if means can be obtained for that object, now for the purpose of extending said railroad we the subscribers agree to associate ourselves with the said company, and hereby promise and agree to pay to the said company the sum of one hundred dollars for each and every share set against our respective names, in instalments of ten per cent. on each share, to be expended by the directors of said company in the extension and construction of said railroad from St. Johnsbury to Derby Line, provided that the undersigned shall not be obliged to pay any part of our subscriptions until the whole road between the last named points shall be put under contract for grading, and that sixty days notice shall be given by the treasurer or directors of said company to us for each and every instalment required to be paid on the shares subscribed, and sixty days shall elapse between the time of payment of each instalment ;” that the defendant signed this contract and affixed to his name thus subscribed the number of one share of the capital stock of said company, and thereby promised to pay the plaintiff's one hundred dollars ; that said company on the 27th of October, 1855, put the whole road from St. Johnsbury to Derby Line under contract for grading, and that on the 27th of May, 1857, the directors of said company made an assessment of ten per cent. on said capital stock, for the purpose of constructing the road so contracted, and required the same to be paid on the first of September following ; and that sixty days notice had been given to the defendant of this assessment and the request to pay the same, but the defendant had wholly neglected to pay it. The *ad damnum* in the declaration was ten dollars.

At the trial before the justice of the peace, judgment was rendered for the plaintiffs, from which the defendant appealed.

In the county court in Windsor county, at the May Term, 1858, REDFIELD, Ch. J., presiding, the plaintiffs moved to dis-

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miss the appeal, on the ground that the case was not appealable. The county court dismissed the appeal, to which the defendant excepted.

Peck & Colby, for the defendant.

Washburn & Marsh, for the plaintiffs.

BARRETT, J. This suit was commenced before a justice of the peace, from whose judgment the defendant appealed.

The appeal was, on motion of the plaintiff, dismissed by the county court, and exceptions were taken by the defendant.

The only question is, whether the declaration showed that the suit was not appealable.

The ground of the action is a contract by which the defendant undertook to pay the plaintiff one hundred dollars, in ten equal instalments, at periods of at least sixty days, no part to be payable till the railroad had been located and put under contract to a certain line. The declaration avers performance of the condition, and claims to recover one of said instalments, under an *ad damnum* of ten dollars.

We are of opinion that the contract set forth is not a note, within the meaning of the statute providing for and regulating appeals and the decisions that have been made in respect thereto. It is, therefore, necessary to consider other grounds on which the defendant seeks to maintain his right to an appeal. One is, that the contract set out in the declaration, and necessary to be produced in evidence in order to support the action, constitutes an exhibit or specification of a claim of a hundred dollars. In favor of this view, it must be granted that the contract is for the payment of the whole sum named, and on the condition being fulfilled as is alleged, the defendant's liability to pay that sum would become fixed and absolute. A judgment in this suit involving an adjudication of the validity of said contract, and of the right of recovery as depending on the performance of that condition, would be conclusive in these respects of the rights and liabilities of the parties as to the remaining instalments, notwithstanding by said judgment the plaintiff could recover only for one instalment.

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We are fully confident that it was not the design of the statute to shut down the parties to the final judgment of a justice of the peace in litigating their respective rights and liabilities under a contract like the one on which this action is based. Inasmuch as the *right* to be litigated extends to the full sum named in the contract, and would be conclusively settled by the judgment for the single instalment, we cannot say that the plaintiff's specification or exhibits do not exceed *ten dollars*. On the contrary, we think that within the spirit and a fair construction of the language of the statute, the appeal was well taken and should not have been dismissed. Judgment of the county court reversed and case remanded.

EDSON LYON v. JOHN K. McLAUGHLIN.

(IN CHANCERY.)

Chancery. Injunction. Tenants in Common.

When the invasion of a right in the use of a watercourse is threatened and intended, which is necessarily to be continuing and operative prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the appropriate remedy is by a bill in chancery praying for an injunction against such invasion, on the ground that it will cause irreparable injury to the orator.

The uncertainty of the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation, render such injury *irreparable* in a legal sense; and therefore a court of equity will entertain jurisdiction of such a bill, and grant the proper remedy, notwithstanding the respective rights of the parties to the use of the water are in dispute, and depend entirely upon the legal construction of their title deeds.

The settlement of a controversy as to the character and extent of the respective rights of tenants in common, and as to the proper mode of exercising and enjoying them, is a proper subject of chancery jurisdiction.

The facts in this case sufficiently appear in the opinion of the court.

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Geo. C. & Geo. W. Cahoon, for the orator.

J. L. Edwards and J. A. Wing, for the defendant.

BARRETT, J. It is agreed that both parties have rights to the privilege of water under their respective deeds. The controversy arises upon the defendant's claim of ownership of a part of the dam, and as to the mode and means by which he is entitled to take the water which, it is conceded, he has a right to use. The determination of this controversy depends on the construction to be given to the deed under which the defendant holds his rights. Upon the construction claimed by the orator, the defendant does not own any part of the dam, and is obliged to take the water from the existing flume without the right to make any other flume for the purpose of taking water from the pond. Upon the construction claimed by the defendant, he does own part of the dam, and has the right to make a flume and thereby take his proportion of the water from the pond for his use.

The parties agree upon plans that show the application of the description to the subject matter, and what will be embraced by each construction of such description, as claimed by the parties respectively.*

Before considering the proper construction to be given to said description, it is advisable to dispose of some other points that are made in the argument.

The defendant insists that the case, as it is made up, does not fall within the legitimate exercise of equity jurisdiction.

The orator sets out in his bill that the defendant claims to own a portion of the dam in question, and threatens to insert a flume in it for the purpose of taking water therefrom, and that if he should do so, it would cause irreparable injury to the orator. The defendant in his answer sets forth the ground of his right as he claims it, and admits that he claims to own a portion of the dam, and has the right to make a flume in the dam for the purpose stated in the bill, and that he had threatened and intended

*NOTE.—The facts relating to the construction of the deeds under which the parties respectively claimed title to the dam in question, are omitted from this report of the case, as the statement of them would be quite voluminous, and would present no legal question of any practical importance.—REPORTER.

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to make said flume, and was about to do so when restrained by the injunction of the chancellor. But he denies that he should thereby work any injury to the orator, for the reason that in so doing he should only exercise the right he has by virtue of his deeds.

If the facts set out in the bill, and admitted by the answer, show a case within the cognizance of the court of chancery for the purpose of granting a perpetual injunction, it would hardly seem warrantable to cavil upon the point made that the facts stated in the bill are not sufficiently authenticated by the oath of the orator. If the defendant does not own the portion of the dam claimed by him, and so has not the right to insert a flume in it, but is limited to the taking of his share of the water from the flume already existing, then it would remain for determination whether the injury produced by the insertion of a flume, as threatened and intended, and the taking of the water through it, would be such to the orator as to entitle him to the preventive remedy of an injunction.

This is to be determined upon the facts, in no way affected by the denial in the answer that the doing so would injure the orator. Such a denial is a mere conclusion of the pleader from the assumption that it would be only exercising a right which the defendant had under his deed.

It would seem to be well settled, as shown by the text books and the cases, that when the invasion of a right in this kind of property is threatened and intended, which is necessarily to be continuing and operative prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible but is the most appropriate means of remedy. It affords in fact the only adequate and sure remedy. For the very doubtfulness as to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation, render such injury *irreparable*, in the sense of the law relating to this subject. Then, too, the continuing of the flume and of the drawing of water through it would be a continuing wrong that would entitle the orator to successive suits so often as fresh damage should occur. Such a case would be altogether unlike those cases of trespass or

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other wrong, in which the injury to the property is specific, definite and capable of certain estimation, in which, therefore, the remedy by suit at law for pecuniary compensation, would be adequate to insure a just reparation. The law touching the cognizance by courts of equity of cases of this kind is well collated and stated in ANGELL on Watercourses, under the head of *Equitable Remedies*, beginning with section 444, where the leading cases are cited and the authoritative adjudications stated. The language of Judge STORY, in *Webb v. Portland Manufacturing Company*, 3 Sum. 189, exactly meets the exigency of the present case.

It is true, indeed, that a court of law might as well ascertain the rights of the parties under their respective deeds, as a court of equity. And if a court of law could administer adequate remedy for the violation of the right, it would constitute a reason for remitting the parties to that court. It is the inadequacy of the remedy at law that gives cognizance of this class of cases to the court of equity.

In the present case there is no occasion to resort to a court of law for any purpose. The bill sets forth a clear right in the orators. The answer admits all the facts, but rests for defence on a question of construction only. That question can as well be determined in a proceeding in the court of chancery as in a suit at law.

Under all the authorities, if the orator shows a clear right, and the impending violation of it in the manner and of the character alleged in this case, the court of chancery should retain the case, and grant the peculiar relief prayed for, by decreeing a perpetual injunction.

There is another view in which, upon a bill properly framed, the jurisdiction of chancery would be clear. The case discloses that the parties have *rights in common* to the use and enjoyment of the water privilege created by said dam. They are in controversy as to the character and extent of their respective rights, and as to the proper mode of exercising and enjoying them. This relation of the parties in reference to the subject matter of it, is the ground of a familiar head of equity jurisdiction, as furnishing the only adequate means of ascertaining the respective

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rights of the parties, and of affording an ample remedy between them.

In pursuance of these views, it only remains to give construction to the deed under which the defendant asserts his claim.

We fully agree in the opinion that the line first mentioned in the description, and which constitutes the southern line of the land conveyed to the defendant by said deed, is to be located by measuring on the flume sixty-eight feet from the shop. This would exclude from the conveyance any part of the dam, and would leave the whole dam the property of the orator.

Accordingly we hold that the defendant has no right to erect a flume in any part of said dam, or to take water therefrom in any other way than through the flume, as it existed at the time of said conveyance to the defendant of the water privilege named in said deed, and that he should be enjoined accordingly.

The case is remanded to the court of chancery for a final decree conformable to this decision, and for the orator to recover his costs.

 THE STATE OF VERMONT v. GEORGE C. FLETCHER.

Criminal law. Breaking jail.

It is an offence under the statute against breaking open a jail, (Comp. Stat., chap. CVI, sec. 11, p. 555,) for a prisoner confined alone in jail to break it open that he may escape.*

INDICTMENT for breaking jail. The indictment charged that the respondent, "on the 10th of November, 1858, was a prisoner confined in the common jail at Irasburgh, in Orleans county, by

* Which statute is as follows: "Every person who shall directly or indirectly break open, or counsel aid or assist in breaking open, or shall attempt to break open, or counsel aid or assist in attempting to break open any jail or place of confinement, in which any person shall be confined by the authority of this State, shall be punished, etc., etc."

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and under the authority of the State of Vermont, and then and there, well knowing the premises, with force and arms, unlawfully did break open and counsel aid and assist divers other ill disposed persons (to the jurors aforesaid as yet unknown) in breaking open the jail aforesaid, while the said George C. Fletcher was a prisoner therein, as aforesaid; thereby enabling the said George C. Fletcher to escape from the said jail and to go at large whithersoever he would; and whereby the said George C. Fletcher did escape from the said jail, and go at large whithersoever he would, contrary to the form, force and effect of the statute, etc., etc."

To this indictment the respondent demurred, but the county court, at the June Term, 1859, in Orleans county, overruled the demurrer, to which the respondent excepted.

Benj. H. Steele and Cooper & Bartlett, for the respondent.

J. E. Dickerman, State's Attorney, for the prosecution.

ALDIS J. The respondent is indicted for breaking jail and letting himself out, and for aiding others to break open the jail that he might escape. To the indictment there is a demurrer, and thus the question arises whether it is an offence under our statute, Comp. Stat., C. 106, sec. 11, for a prisoner confined alone in jail to break it open that he may escape.

The words of the statute are, "every person who shall break open any jail," etc. There is no exception on behalf of the prisoner confined in the jail. Nor can any exception be fairly implied from the language of the act. It includes both those who from the outside and from the inside commit the criminal act.

Nor do the words "break open," imply, as is claimed in argument, that those who are to commit the offence, must be on the outside.

It has been held at *nisi prius* so frequently and generally that it must be considered as the settled rule, that where a prisoner breaks open or aids in breaking open a jail so that others escape, he is an offender within this statute. The same has been held in New York under a similar statute; 12 Johns. 339.

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In this State, when the prisoner who breaks jail is confined alone, so that nobody but himself can escape, the rulings in the county court have been conflicting.

It has been urged that the natural instinct to escape from prison is so strong that it could not have been intended to make the yielding to it a criminal offence. But we think this is a tenderness to the imprisoned which is not consonant with good sense, or the spirit of our laws for the prosecution of crime, or with justice. It is more than fair dealing and justice require.

The indictment is therefore held sufficient, but as the respondent asks leave to plead and to have a trial, a repleader is granted.

*ISAAC MCNEIL v. AMOS P. BEAN.**Attachment. Officer. Practice.*

The charges of an officer for keeping property, which he has attached, during the pendency of the action under which the attachment was made, constitute a lien upon the property, which must be satisfied before the proceeds of the sale of the property are applied upon the execution; and it is not necessary in order to preserve this lien that these charges should be taxed as costs and included in the execution.

But this priority of lien extends only to the avails of the property itself, which is so kept; and an officer is not justified in applying to the satisfaction of such untaxed charges, in preference to the payment of the execution, money which he receives from one who has become recognized to the plaintiff for costs, and who makes such payment in satisfaction of his liability under such recognizance.

SCIRE FACIAS upon a recognizance by the defendant to the plaintiff for costs in a suit in favor of the plaintiff against William and Willard Leland, which was appealed from before a justice by said Lelands.

The facts in the case are sufficiently set forth in the opinion of the court.

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J. P. Sartle and T. P. Redfield, for the plaintiff.

J. H. Prentiss, for the defendant.

ALDIS, J. The plaintiff sued William and Willard Leland in an action of trespass, and attached a horse belonging to one of the defendants. The suit was originally brought before a justice of the peace, but was appealed to the county court. While pending there this defendant was recognized to the plaintiff in one hundred dollars for costs of prosecution, and the present action is *scire facias* upon that recognizance. The original case was finally decided in the supreme court, the plaintiff recovering three dollars and seventeen cents damages and seventy-six dollars and thirty-two cents costs, for which he took out execution. The horse which was attached remained all this time in the possession of the officer who attached it, and his charges for keeping the horse amounted to one hundred and sixty-five dollars and ten cents. The horse was sold on the execution for seventy-three dollars, and the avails after paying two dollars and seventeen cents for fees and charges on the execution were applied, not upon the execution, but in part payment of the charges of the officer for keeping the horse, and leaving a balance still due him therefor of about ninety dollars.

The defendant insists first, that the officer levying the execution had no right so to apply the money, but that he should have applied it upon the execution. He claims that the plaintiff should have had the charges for keeping the horse taxed like other costs and included in the execution, and that unless so included in the execution the officer had no right to apply the avails upon the charges for keeping.

The language of the statute, (Comp. Stat., p. 310.) authorizes the officer to sell the property "to satisfy the execution with the legal costs and charges thereon." "The moneys arising from the sale shall be applied to the payment of the charges and the satisfaction of the execution." The words "the charges" mean, we think, charges on the execution, not the charges which accrue prior to judgment.

"The moneys arising from the sale" must mean the moneys

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arising from the sale of the debtor's interest after paying off liens and incumbrances (if any) which are prior to the execution. Are the charges for keeping a lien upon the property which must be paid before applying the avails upon the execution? If they are, is the lien lost by omitting to have such charges taxed as costs and included in the execution?

It is clear that there is no contract between a defendant whose property is attached and the officer attaching it, by which the defendant becomes liable to him for the charges of keeping. The defendant may recover in the suit. If he does, he is entitled to have his property back without paying any costs or charges for keeping. In such case the attaching officer must look for his pay to the plaintiff or person who employed him to make the attachment.

But the attachment creates a lien on the property to respond the judgment if one should be recovered by the plaintiff. Hence if he recovers, he has the right to have the attached property sold and the avails applied upon the damages which he may recover and the costs of suit which may follow the judgment. The fees of the officer in attaching the property are costs of suit. As he is bound in law to keep the property he attaches to be sold on the execution, which the plaintiff may recover, he must be entitled to the expense he necessarily incurs in so doing. It has always been considered in this State that such charges become by operation of law a lien on the property, and when the property is sold the avails must in the first instance, (after paying the costs of the levy and sale,) be applied in payment of such charges. This is done to protect the officer in the necessary discharge of his duty, and nothing can be more reasonable. We do not understand that the defendant denies that such charges are costs which might be taxed and included in the judgment and ought to be paid, but he claims that if not taxed and included in the judgment they cease to be taxable costs and the lien is lost, in short that they are like all other taxable costs, which cannot be paid by the officer with moneys arising from the levy of the execution unless they are taxed and included therein.

There is nothing in the statute which by express terms requires such costs to be taxed and included in the judgment, or directs or

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forbids the payment of them with the avails of the property sold on the execution. To determine this point it is reasonable to consider the practice of the courts as to the taxing of such costs, and the custom which prevails as to the application of moneys in payment of them.

We believe we may say that it has been the practice of the courts not to tax such costs and include them in the execution, a practice which has always existed in this State, and has been very general, perhaps we may say almost universal. On the contrary it has been left to the officer collecting the execution to pay these charges, in the first instance before applying anything on the execution. We think it has been the general understanding of the profession and of the courts that the charges for keeping property are a lien upon the property, in the keeping of which the charges accrue, when the party making the attachment recovers judgment. Such a custom, so general and so ancient, and which is in continual and common use, (for cases for the application of it arise every day,) must be regarded as having given a practical construction to the statute. If we were to reverse this practice and decide that officers could not so pay such charges unless taxed as costs, we should expose them in the numberless instances where they have done so, to harassing and inequitable lawsuits by debtors to recover back the moneys so applied. This would be opening a wide door to unjust litigation. If this were a new case and the practice now first to be established, we might hold it better to require such charges to be taxed like other costs and to be included in the judgment. There seems to be but little reason for making a difference between them and other costs, and there would be less danger of abuse if they were to be directly subjected in the first instance to taxation by the clerk or court.

It further appears in the case that another person recognized to the plaintiff for costs in the original suit of the plaintiff against Lelands has paid fifty dollars to the plaintiff, and that he has applied the same on the charges for keeping. It does not appear that this was done by the direction or consent of the defendant or the party paying it. In such case we think the law would apply it in the first instance upon the execution. Such an

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application seems to be most reasonable and equitable, and most consistent with what may be presumed to have been the intent of the parties.

As the case stands upon demurrer to the replication, the demurrer must be overruled. But as issues are joined upon another plea, the case must stand for trial upon those issues.

HIRAM HILL v. SMITH & CARPENTER.*Contract. Sale. Damages.*

The defendants contracted to deliver the plaintiff a certain quantity of oats in the month of January following at a certain price, for which the plaintiff paid them in full in advance. The defendants delivered a portion of the oats in January, and it was then agreed by the parties that the defendants need not deliver the remainder in that month, provided they would deliver them as fast as the plaintiff should want them. The defendants accordingly delivered oats to the plaintiff during the following spring and summer until July, when they declined furnishing the remainder due under the contract. The price of oats remained the same from the time of making the contract until through January, but advanced between that month and July. The plaintiff brought assumpsit against the defendant, declaring on the contract as originally made, and setting forth as a breach the non-delivery of the oats in January, and claiming only general damages. The declaration also contained the common counts; *Held*, that under this declaration no higher measure of damages could be recovered than such as resulted from the non-delivery in January, and that in order to recover the advance in price between January and July, the declaration should set forth the enlargement of the contract.

In an action for the breach of a contract for the sale and delivery of an article, the measure of damages is its market value at the time stipulated for its delivery, and this rule is not varied by the payment of the price in advance.

ASSUMPSIT. The declaration, the facts in the case, and the charge of the county court, so far as they are material to the questions decided, are sufficiently stated in the opinion of the court. In addition to the special count mentioned in the opinion of the court, the declaration also contained the common counts.

To the charge of the court as detailed in the following opinion, the defendants excepted.

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A. J. Willard and J. Ross, for the defendants.

J. D. Stoddard and Slade & Edwards, for the plaintiff.

BARRETT, J. The declaration sets forth and counts upon a contract made on the 6th day of December, 1856, for the delivery, by the defendants at their store, within the month of the then next January, of two thousand bushels of oats, for the price of thirty-six cents per bushel, towards which twenty-five dollars was paid by the plaintiff at the date of the contract, and the residue of the purchase money was to be and was paid by the plaintiff within the then next week. The breach alleged is that the defendants did not deliver the oats within said month of January, nor at any time since, though then and since demanded and requested by the plaintiff, who was ready to receive them. General damage only is averred.

The evidence showed that along in said month of January till about the 20th, the plaintiff received, at the store of the defendants, a large quantity of the oats, at which time one of the defendants told the plaintiff that he did not know as he could get the oats all in the month of January, to which the plaintiff replied that it would make no difference, provided they got them for him as fast as he wanted them; that from time to time till the middle of July, the plaintiff continued to get oats from the defendants' store, at which time the defendants told the plaintiff that they could not deliver any more. This suit is brought to recover the damage caused by the non-delivery of the residue of the two thousand bushels.

It was proved that through the winter oats remained at about the contract price, but that at the time of the refusal by the defendants to deliver any more, the price had advanced to fifty or seventy-five cents per bushel.

The court charged "if the jury found the time of delivery was extended by the request of the defendants, and they knew that the plaintiff was relying upon receiving the oats of them, and when ultimately called upon for the oats, they refused to deliver them, and the oats had risen in value, the plaintiff would be entitled to recover the value of the oats at the time of their refusal to deliver them, and interest since that time."

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The foregoing statement, with the charge thus quoted, sufficiently develops the point of exception that we are called on to decide.

The subject seems to stand for consideration in two aspects, viz : either that what passed between the parties, in the character of a waiver of performance by the delivery of the oats within the month of January, changed the rights and liabilities of the parties from what they were under the written contract, or that the rule of damage is different by reason of the purchase money having been paid in advance, from what it would be if the money was to have been paid on the delivery of the oats.

As to the first aspect, if, in the language of the charge, "the time of delivery was extended by the request of the defendants," and in such a sense as to affect the rule of damage, and entitle the plaintiff to an increased measure, it must be regarded as an alteration of the contract from what it was upon the paper, into a new one by parol, and consequently in order to entitle the plaintiff to recover the enlarged measure of damages, the new contract resulting from such alteration should have been counted upon.

It seems to me, and as I understand, to some other members of the court, that there is no difficulty in holding that, under his declaration and proofs, the plaintiff might recover the money he has paid for the undelivered oats or the market price of the oats at the time of the alleged breach. If the defendants should assert the alleged waiver of delivery in the month of January, in answer to the alleged breach, we should regard it necessary for them to show that they had performed under the waiver, in order to render such waiver available to them in defence. If it should turn out that the defendants had not performed according to the terms of the waiver, the parties would then stand upon the same ground of right and liability as if no waiver had been made ; *Lawrence v. Dole*, 11 Vt. 549. Such we understand to be the idea of the learned Judge in *Cummings v. Arnold*, 3 Met. 486.

In this case the defendants claim nothing in defence by reason of the alleged waiver. We think then if the plaintiff would claim anything by reason of the enlarged time for the delivery of the oats, and the ultimate refusal of the defendants to deliver them in pursuance of the enlargement, his declaration should be

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framed to cover the contract as thus enlarged and altered. In other words, we think that between the contract set forth in the declaration and the one assumed in the charge there is a variance. Whether, upon what transpired between the parties touching the time in which the oats might be delivered in satisfaction of the defendants' undertaking, the plaintiff *must* count upon the contract as enlarged by parol, in order to entitle him to recover at all, it is not now necessary to decide.

Under the declaration as framed, we think the parties must be regarded as standing upon the contract as written, duly performed on the part of the plaintiff, and not performed by the defendants, and unaffected by what is shown to have transpired between them, as to waiving delivery within the time specified in the written contract.

It remains to be considered upon the same aspect of the case, whether the plaintiff is entitled to the rule of damage given to the jury in the charge, by reason of having paid *in advance* for the oats, agreeably to the stipulation in the contract of purchase. It is to be noted that there is no averment of special damage in the declaration, nor did the evidence show what specific damage the plaintiff had sustained. It was left to be inferred from the fact that at the time of the ultimate refusal by the defendants to deliver more oats, the market price of oats had advanced. That advanced price was adopted as the rule of recovery.

It is argued that if the contract had been for the delivery of the oats within a time specified and for payment on such delivery, under such a declaration as this, the rule of damage would have reference to the price of the oats at the time specified for their delivery, and that rule would not have been affected by the fact of a dispensation of strict performance by delivery within the specified time, such as occurred in the present case.

Whether the fact that the purchase money was paid in advance varies the rule of damages, is a question on which the cases and the text books are in some conflict and confusion. Without entering into a discussion for the purpose of adjusting the balance of authority or the comparative merits of the different views adopted by different courts and judges, it seems sufficient for present purposes to say that it has not been adjudged in this

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State, that payment in advance in such a case varies the rule of damages, and so far as any indication can be gathered from the cases involving, in greater or less degree, this subject, it seems to be in the direction of not permitting that fact to affect the rule.

Upon principle, as well as in view of practical consequences, we prefer the result at which Mr. SEDGWICK has arrived upon a most elaborate and able examination of the subject, that the market value, or price on the day of the breach of the contract, controls the measure of damages. This result is spiritedly endorsed by Chancellor KENT, whose attention was specially called to the subject by a criticism upon the rule as laid down by him in the original edition of his commentaries. See Sedgw. on Dam., pp. 278, 274 and note; 2 Kent's Com. 480, (6th Ed.) Chancellor KENT's language is, "I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damage is the value of the article at the time of the breach, or when it should have been delivered."

The judgment of the county court is reversed and the case remanded for a new trial.

SIMEON A. BABBITT AND EMILY K. BABBITT, HIS WIFE, v.
DUSTIN BOWEN, DUDLEY C. DENISON AND RACHEL C.
DENISON.

[IN CHANCERY.]

Settlement of estates. Foreclosure of mortgage.

It is not indispensable to the settlement of a deceased person's estate that an administrator should be appointed, or that the probate court should take any proceedings relative to the estate. The heirs may, if they see fit, pay the debts and divide the surplus among themselves.

In a petition for the foreclosure of a mortgage it was alleged that the mortgagee was dead; that the petitioner was one of his heirs; that the mortgagee's

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heirs divided his property among themselves, and agreed that the note and mortgage in question should belong to the petitioner, and that they were then assigned and delivered to her; *Held*, that this was a sufficient averment that the legal interest in the mortgage and note in question had been transferred to the petitioner.

In such a case it further appeared that there was only one unpaid claim against the mortgagee's estate, and that that amounted to only one hundred dollars; that no administrator had been appointed, nor any proceedings had in the probate court relating to the settlement of the estate; that the estate amounted to about forty thousand dollars; that all the heirs of the mortgagee admitted the mortgage debt in question to belong to the petitioner; and that the only person claiming to be a creditor of the estate, though aware of the petition for foreclosure, had not asked for the appointment of an administrator, nor claimed the benefit of this mortgage debt as a security for her claim, nor asked to be made a party to the petition; *Held*, that the petitioner was entitled to a decree of foreclosure, upon furnishing the maker of the mortgage note indemnity against any liability to pay it a second time.

PETITION for the foreclosure of a mortgage. The facts in the case and the decree of the chancellor appear in the opinion of the court. The defendants appealed from the decree of the chancellor.

William Hebard and *J. B. Hutchinson*, for the orators.

A. P. Hunton, for the defendants.

ALDIS J. This is a petition for the foreclosure of a mortgage. The orators allege the execution of a mortgage from the defendant Dustin Brown to Alvin Kinstry, that Kinstry is dead, that the oratrix, Babbitt, is one of his heirs, and then proceeds thus, "that the oratrix and the other heirs of Kinstry divided among themselves certain notes and choses in action belonging to the estate of Kinstry, and the said heirs then agreed that the said note and mortgage should belong to and be the property of the said Emily K., (the oratrix) and they were then duly assigned and delivered to her as her property, of all which the defendant then had notice, and he agreed to pay said note to her, and has paid her some interest which has accrued thereon."

It is objected that this is not a sufficient averment that the legal interest in the mortgage and note has been transferred to her; that for aught that appears there may be an administrator or executor, and that there may be debts due from the estate,

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and the avails of this note may yet be required to pay such debts; that the heirs could not by agreement among themselves divide the choses in action until the debts had been paid and the administrator or executor had assented to the division; and therefore the bill should have shown affirmatively that there was no executor or administrator; that there were no debts to be paid, or that the executor or administrator had agreed to and united in the distribution by the heirs of the choses in action among themselves.

The expression used in the bill is a very general one: that the heirs by agreement divided among themselves the choses in action; that they agreed this note should belong to the oratrix, and then it says, "the note and mortgage were then duly assigned and delivered to her as her property."

We think the fair construction must be that this was done by the heirs, and that it cannot be extended to mean that the assignment was by an executor or administrator, or by an order of the probate court.

Would such a division, by agreement among the heirs, of the personal property of a deceased person be legal? If it would, the averment is sufficient.

It is not indispensable to the settlement of a deceased person's estate that there should be an appointment of an administrator by the probate court; or that there should be any proceedings in that court relative to the estate.

If all the heirs and creditors of the estate see fit to proceed and settle the estate, to pay the debts and divide the surplus by amicable arrangement, and without the aid of an administrator and of the probate court, they can do so. The administrator is not a public officer whose intervention is made necessary by statute or public policy. The title to the real and personal estate descends to the heirs at once, either, first, by the will, or, second, by the general provisions of the law directing the descent and distribution of estates. By law an administrator is not an indispensable medium or conductor through whom the estate must be taken from the deceased and passed over to the heirs. On the contrary, the law passes it directly from the deceased to his heirs or devisees by descent or devise, precisely as it passes from a grantor

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to a grantee by deed. When an executor or administrator is appointed he intervenes from necessity or convenience in the settlement of the estate, and then his duties and his representation of all the persons interested in the estate suspends for the time being the direct descent, devise or division of the estate.

It is so unusual for estates to be so situated that they can be settled without the aid of an administrator and of the probate court, that many think such administration indispensable. But it is not. The real owners of property by inheritance can settle and divide it among themselves if they see fit. The advantage of barring claims against the estate by proceedings before commissioners, as well as the convenience of the statutory mode of proceeding in the probate court, make any other mode of settling and dividing estates very unusual.

But as heirs can do so, and as the averment, though very general, avers in substance they have done so, we think the petition on its face shows a legal title to the note and mortgage in the oratrix.

II. The defendant insists that there is a debt due from the estate, a claim which is disputed, and which may require the avails of this note to pay, and therefore there ought to be an administrator.

But it appears in proof that Kinstry left a will; that the executor declined to accept the trust; that no administrator has been appointed; that there have been no proceedings in the probate court except to prove the will; that the two heirs take all the estate as they would by descent, except the devise of some household furniture to three devisees; that these devisees have been paid and have received what was devised to them; that there are no debts or claims against the estate, except the single disputed claim of Mrs. Kinstry's granddaughter, Mrs. McIntosh, for her services as a servant and nurse to the deceased, (which appears to amount only to about one hundred dollars); that she has not asked for the appointment of an administrator, nor claims the benefit of this debt as a security for her claim; that there are but two heirs to the estate, and the other heir fully admits this mortgage debt belongs to the oratrix, and that the estate of the deceased amounts to about forty thousand dollars.

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As there is no executor or administrator ; as the heirs ask for none and agree fully to settle the estate themselves ; as there can be but one creditor, and she does not ask for an administrator, and lays no claim to this debt to be applied to her use ; as there are no devisees to call upon the defendant for the debt, we do not see how any injury can possibly accrue to the defendant by allowing the oratrix to proceed with her foreclosure. In cases of this kind a court of chancery exercises their discretion, and where it appears that there is a party not joined in the bill whose rights might affect or be affected by the rights or interests of parties to the bill, they make an order for the joinder of the party. Here Mrs. McIntosh makes a claim against the estate, but knowing of this suit, having been a witness, she neither asks for the appointment of an administrator nor to be joined here as a party having a claim to the fund. So long therefore as she, with this knowledge, declines to act at all in any way to embarrass the defendant in paying the debt, we think he may safely pay it upon the chancellor's decree. The chancellor has made it a condition precedent to the operation of the decree of foreclosure rendered by him, that the orators file in court a bond to the satisfaction of the chancellor in the sum of one thousand dollars, for the security and indemnity of the defendant Bowen against any liability to be again called upon to pay the note secured by the mortgage in question.

This requirement of indemnity against any possible injury from the claim of Mrs. McIntosh was a precaution of which the defendant cannot complain, and is fully justified by precedents both at law and in equity.

The decree of the chancellor is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CHITTENDEN,
AT THE
JANUARY TERM, 1860.

PRESENT:
HON. ISAAC F. REDFIELD, CHIEF JUDGE,
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. JAMES BARRETT, }

GEORGE T. HANFORD v. STEPHEN E. PAINE AND TRUSTEE,
JUSTUS EDBON.

Assignments for the benefit of creditors. Conflict of laws. Comity.

If a general voluntary assignment for the benefit of creditors be made according to the laws of the domicile of the assignor, it will be valid to pass all the personal property of the assignor wherever situated, unless its operation is limited or restrained by some local law or policy of the State where the property is found.

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The statute of 1852 relating to assignments, for the benefit of creditors, (Acts of 1852, p. 14,) was intended, so far as personal property is concerned, to apply only to assignments, either made in Vermont, or made elsewhere by residents of Vermont, temporarily absent, or who went from this State for the purpose of making the assignment.

P., a resident of New York, made in that State an assignment of all his property for the benefit of his creditors. Among his property was an interest as partner in a stock of goods in a store in Vermont, which his partner, a resident of Vermont, carried on. The assignment was valid by the laws of New York, but it was not in accordance with the statute of this State relating to such assignments, and no copy of it was filed in any county clerk's office in this State; *Held*, that the statute of 1852, in relation to assignments, did not apply to the case, and that as the assignment was valid by the laws of New York, the personal property assigned, situated in this State, after the assignees had taken possession of it, passed fully to them, and was not subject to be attached, or held by the trustee process, at the suit of the creditors of the assignor.

The preference of the debts of our own citizens over those of the citizens of other States, in the case of a voluntary assignment for the benefit of creditors, made in another State by one domiciled there, and including within its operation personal property in this State, is to be deprecated except when by the laws of the State where the assignment is executed, such a discrimination is made in favor of its own citizens as would deprive our citizens of their fair proportionate share of the avails of the insolvent's property.

TRUSTEE PROCESS. The cause was referred to a commissioner, who reported that on the 18th of December, 1854, the defendant Paine, a resident of the State of New York, being insolvent, made in that State an assignment of all his property, both real and personal, to A. Fellows and Henry H. Hathorn, also residents of New York, in trust for the benefit of his creditors. In this assignment certain of the assignor's creditors were preferred, among whom were the assignees themselves. The assignment was in all respects in accordance with the laws of New York, but the provisions of the statute of this State, relating to assignments, passed in 1852, were not complied with in the following particulars: first, the assignment was not specific nor accompanied with an inventory of the property assigned; second, the assignees were among the creditors of the assignor provided for by the assignment; and third, no copy of the assignment was ever filed in any county clerk's office in this State.

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The property of the assignor consisted of certain real and personal property situated in the State of New York, and a moiety interest in the stock of goods and other assets of a partnership, of which the assignor and the trustee, Edson, were the only members. This partnership was a mercantile one, and their business was carried on by Edson in Brookfield in this State, where he resided, and where their store and all their goods were situated. The other assets consisted of debts due to the firm from citizens of Vermont, and, together with the stock of goods, after deducting the partnership liabilities, amounted in value, at the time of Paine's assignment, to about four thousand dollars.

Immediately after the execution of the assignment in New York, the assignees went to Brookfield and notified Edson that Paine's interest in the property of the firm had been assigned to them. On the next day, the 20th of December, 1854, the assignees sold to the trustee all of Paine's interest in the stock of goods and other assets of the firm, which had been so assigned to them, for two thousand one hundred dollars, in payment whereof the trustee then paid them one hundred dollars in cash, and delivered them five notes of four hundred dollars each, dated at Brookfield December 20th, 1854, signed by the trustee and payable to the order of one Upham, in fifteen days, one, two, three and four months from date respectively, and endorsed by Upham.

After this sale and the delivery of these notes to the assignees, and before the maturity of any of the notes, the plaintiff, who was also a citizen of New York, and one of Paine's creditors, caused this trustee process to be commenced against Edson.

Upon this report of the commissioner the county court, at the September Term, 1858, BENNETT, J., presiding, adjudged that the trustee was not chargeable, to which the plaintiff excepted.

Asahel Peck and Frederick G. Hill, for the plaintiff.

1. It is well settled that if the law of the domicile of the vendor, where the contract is made, is injurious to the public rights or the interests of the citizens, or offends the morals, or contravenes the policy, or violates any of the positive laws of the country where the property is situated, it must yield to the law of the place of the *situs* of the property at the time of the trans-

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fer; 2 Kent's Com. 457-8, note b.; Story's Conf. of Laws, secs. 383, (note 4,) 327, 423, (a.) 550 and 390; *Taylor v. Boardman*, 24 Vt. 581; *Atwood v. Protection Insurance Co.*, 14 Conn. 555; *Norris v. Mumford*, 1 Cond. Louis.; *Olivier v. Towns*, 2 ib. 606; *Ramsey v. Stevenson*, 1 ib. 338; *Thuret v. Jenkins*, 1 ib. 566.

2. That it is competent for our legislature to prescribe a particular mode of conveyance by which property, both real and personal, situate and being within its jurisdiction, shall be transferred, and which should be observed by the courts, we apprehend admits of no doubt; *Hunter v. Potts*, 4 Term 182; *Prall v. Richmondville Manufacturing Co.*, 9 Conn. 487; *Atwood v. Protection Insurance Co.*, 14 Conn. 555; *Van Buskirk v. Hartford Fire Insurance Co.*, 14 Conn. 483; *Holmes v. Remsen*, 20 Johns. 229, 253, 268; 2 Kent's Com. and Story's Conf. of Laws, *ub. sup.*

3. The statute of 1852, relative to assignments, relates to assignments made out of the State as well as those made in the State, when sought to be enforced or made operative on property situated here. It is general and without exceptions or qualifications, and must govern as to property situated here at the time of the transfer; *Prall v. Richmondville Manufacturing Co.*, 9 Conn. 487, 494; *Atwood v. Protection Insurance Co.*, 14 Conn. 555; *Zipcey v. Thompson*, 1 Gray 243; 1 Green 326, cited in 2 Kent's Com. 458, and in 14 Conn. 559; Story's Conf. of Laws, sec. 472 (a.), 473 (b.), 524. Our statute relating to the payment of debts of deceased persons equally or *pro rata*, applies not only to our own citizens, but to all foreign creditors who have their claims allowed, without reference to the law of the domicile of such creditors. This is more analogous to the case at bar than the statute relating to the distribution among heirs by succession.

4. In this assignment and the course pursued under it, not only have the parties acted in direct contravention of the second, third, fourth and eighth sections of our statute of 1852, but the policy of our law has also been departed from. The rule prescribed by the legislature as applicable to assignments is well calculated to accomplish its objects, which are, among other

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things, to promote the interests of citizens in an expeditious, safe and cheap manner, and obviate the delay, insecurity and suspense to which the execution of such trusts under the common law were subject.

5. But whatever may be the rule as applicable to isolated pieces of personal property in this State, accidentally or temporarily here, we insist that the statute must be complied with in cases like this, where the assignor, resident out of the State, has entered into and carries on business here under our laws, and has accumulated property here and contracted debts on the faith of it, and the subject of the assignment is the entire property of the concern, and its effect is to render it impossible for the assignor's creditors to attach any of his property in this State. In such a case the business acquires a *situs* or domicile here, and the law of the *situs* or domicile of the business, and not of the assignor, should govern the transfer, and more especially so because the assignment, so far as the property in question is concerned, was to be carried into effect in this State. The rule is well settled that a contract is to be governed by the law of the place where it is to be executed; *Pecks & Co. v. Barnum and Trustee*, 24 Vt. 75; 2 Cond. La. 609.

6. If a person sends his property into another jurisdiction from that of his residence, he by implication submits it to the rules and regulations in force in the country where he places it, and if he dies, so far as concerns creditors, it is governed by the laws of the place where it has its actual *situs*; *Story's Conf. of Laws*. secs. 388, 524.

7. If the transfer of property situated here is governed by our law, it makes no difference that the plaintiff is a citizen of New York. Our statute expressly makes the contract void as to the creditors, and subjects the property to attachment and the trustee process, and if the assignment is invalid as to creditors resident in Vermont, it is equally so as to creditors resident in New York or any other State. It is either valid or invalid, without reference to the residence of the parties. Any such discrimination would lead to endless confusion, and is not sanctioned by principle or authority. The consideration that the allowance of a foreign law to supercede our own as to property situated here would

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contravene the policy of the law of this State, and be injurious to our citizens, may furnish a reason for not regarding such foreign law, but it affords no ground for applying our law to our own citizens and another law to citizens of another State, in regard to the same subject matter ; *Zipcey v. Thompson*, 1 Gray, 248.

William G. Shaw, for the trustee.

The assignment, being valid in New York where it was executed, and where the assignor and assignees resided, and where a portion of the assigned property was located, is valid also in Vermont. Being a New York assignment, it is to be governed by the laws of that State.

It is a general principle of universal jurisprudence that personal property has no *situs*, but, wherever situated, is governed as to the rules of succession, testamentary disposition and voluntary transfer, by the laws of the owner's domicile, if the transfer is made there. The universal acquiescence of all civilized nations in this principle shows its justice, while experience and reason alike demonstrate that it is the only rule by which an extensive and harmonious commercial intercourse between different nations can be maintained.

To this salutary rule there are but three exceptions :

1. When its application will tend to a violation of the cardinal principles of morality and to the encouragement of crime.
2. When, if enforced, it will have the effect to injure the citizens of the country where the property is found.
3. When the common or statute law of such country contains an express and unequivocal provision in regard to the mode of transfer or the rule of distribution of *all* property within its limits, whether owned out of its jurisdiction or not ; *Saunders v. Williams*, 5 N. H. 215 ; *Van Buskirk v. Hartford Fire Insurance Co.*, 14 Conn. 584 ; *Ward v. Morrison*, 25 Vt. 593 ; *Whipple v. Thayer*, 16 Pick. 25 ; *Daniels v. Willard*, *ib.* 36 ; *Burlock v. Taylor*, 16 Pick. 335 ; *Bholen v. Cleveland*, 5 Mason 174 ; *Burrill on Assignments*, 362 *et seq.* ; *Story's Conf. of Laws*, chap. 9, secs. 379 and 380.

It will not be claimed that the case at bar comes within either

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the first or the second exception, because there is nothing immoral in this assignment or its purposes, and because the interests of citizens of Vermont are not affected by the question at issue, the controversy being entirely between citizens of New York.

The real question, therefore, is, whether this case comes within the third exception; and, as there is no provision of the common law of this State which is in any respect contravened by this assignment, the question is simply whether the act of 1852, in relation to assignments for the benefit of creditors, (Laws of 1852, p. 14,) applies to assignments executed in another State by a non-resident of Vermont, including within their terms and operation, not only real and personal property situated elsewhere but also movable personal property in this State.

While the power of the legislature to make a law with such an application, and for that purpose, is not to be denied, still the general principle, which such a law would contravene, is of so great utility and almost indispensable necessity for all the purposes of a liberal and harmonious commercial intercourse with our sister States and other countries, and has received so universal a sanction from the whole civilized world, that none but the most certain and unambiguous words should be construed to abrogate it.

The language of every statute, except when it in terms provides expressly otherwise, is construed to apply only to acts done or duties neglected within the limits of the State by which it is enacted. In the first section of the statute of 1852, the words "all assignments hereafter *made* of property, etc., etc.," therefore, mean "all assignments hereafter made in this State, etc." The third section, which requires a copy of the assignment to be filed in the county clerk's office in the county *where the assignment is made*, shows that the statute was intended to operate solely upon assignments made *within this State*.

The statute of distributions of the personal estate of deceased persons. (Comp. Stat., chap. 51, p. 335, sec. 1,) is as general and comprehensive in its terms as that of 1852, in regard to assignments. It has never been claimed that this statute applies to any other than a resident of Vermont. So also of the statute of wills; Comp. Stat., p. 327, sec. 6; 2 Kent's Com. 429.

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These three statutes are equally general and comprehensive, and there is no reason why they should not be governed by the same rule of construction.

The assignment law of 1852, like the statutes of distributions and of wills, and the great bulk of our laws was meant to apply to *our own citizens*, or to acts done and contracts made within our own territorial limits. It was intended to control assignments made in Vermont, either actually or constructively, by citizens of Vermont, and governs their movable personal property included in such assignments, wherever it may be. It also applies to assignments actually, and in good faith, made and executed in Vermont by citizens of other States. It was meant to control *Vermont* assignments and none others.

In numerous cases the great principle that personal property has no *situs*, but is governed and controlled by the law of the owner's domicil, has been applied to laws prescribing conditions and modes of a valid assignment for the benefit of creditors, and in every case the decision has been that *so far as regarded creditors who were not citizens of the State where such laws existed*, they did not apply to assignments made out of such State by non-residents, though such assignments might include within their terms personal property located within its territorial limits.

Whipple v. Thayer, 16 Pick. 25; *Daniels v. Willard*, *ib.* 86; *Burlock v. Taylor*, *ib.* 335; *Van Buskirk v. Hartford Fire Insurance Co.*, 14 Conn. 584; *Ward v. Morrison*, 25 Vt. 593; *Sanderson v. Bradford*, 10 N. H. 230, construing New Hampshire Revised Statutes, 260; *Mallory v. Snow and Trustee*, Law Reporter, November, 1858, p. 431; *Martin v. Potter*, *ib.* 558, construing Massachusetts Statutes of 1836, chap. 238, sec. 11, and the general insolvent laws of Massachusetts, 39 and 40; *United States v. Bank of the United States*, 8 Robinson (La.) 263; *Merchants' Bank of Baltimore v. Bank of the United States*, 2 Louis. Ann. Rep. 659; *Chewning v. Johnson*, 5 *ib.* 678; *Richardson v. Leavitt*, 1 *ib.* 430; *Chartres v. Carnes*, 3 Cond. La. Rep. 208; *Speed v. May*, 17 Penn. St. (5 Harris) 91; *Law v. Mills*, 18 Penn. St. (6 Harris,) 185; *Caskie v. Webster*, 2 Wallace, Jr., 131; *Forbes v. Scannell*, 1 Labatt (California Dist. Ct.) 132; *Frazier v. Fredericks*, 4 Zabriskie (N. J.) 162; *Burrill* on

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Assignments, 2d Ed., 263-5; *Maberry v. Shisler*, 1 Harrington, (Del.) 349.

The doctrine advanced by the plaintiff, and on which he wholly relies, if admitted to be sound, renders entirely unmeaning the numerous decisions and *dicta* of the most eminent judges and law writers of this country, who therein positively assert the difference between voluntary and involuntary assignments, between those caused solely by the act of the party, as the one now before the court, and those caused by the act of the law, as assignments under a bankrupt or insolvent law. This distinction is well settled to be that the *lex domicilii* controls in the former case, but in the latter the *lex loci rei sitae* governs; *Frazier v. Fredericks*, 4 Zabriskie (N. J.) 162; GRIER, J., in *Caskie v. Webster*, 2 Wallace, Jr., 131; Burrill on Assignments, 2d Ed., 365, (note 3,) 370; *Hoyt v. Thompson*, 1 Selden 352; *Saunders v. Williams*, 5 N. H. 214; *Speed v. May*, 17 Penn. St. 94; *Sanderson v. Bradford*, 10 N. H. 264; Story's Confli. of Laws, sec. 411; *United States v. Bank of United States*, 8 Rob. (La.) 414; *Holmes v. Remsen*, 20 Johns. 265; *Milne v. Morton*, 6 Binney 361; *Blake v. Williams*, 6 Pick. 314; *Green v. Mowrey*, 2 Bayley (S. C.) 113, cited in note to 2 Kent's Com. 407.

The plaintiff is also compelled, by the force of his position and the tenor of his argument, to ignore the theory of that long series of respectable authorities which assert the principle that a general law in regard to the mode of transfer of personal property, which does not in *express terms* apply to all property within the limits of the State, without regard to the domicil of the owner, will be extended so as to form an exception to the great principle that personal property is referable to, and controlled by the laws of the owner's domicil, only when the rights and claims of creditors, *who are citizens of the State where the property is found*, and such law exists, are concerned. In such cases the law of the State where the property is situated is held by these authorities to govern it, so far as the claims and debts of *citizens of that State* are concerned, and no further; *Potter v. Brown*, 5 East 124; *Ingraham v. Geyer*, 13 Mass. 146; *Fall River Iron Works v. Croade*, 15 Pick. 11; *Sanderson v. Bradford*, 10 N. H. 265; *Olivier v. Towns*, 2 Louis. Cond. 606; *Merchants' Bank v. Bank of United States*,

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2 Louis. Ann. 661 ; *Chewning v. Johnson*, 5 ib. 679 ; *Ward v. Morrison*, 25 Vt. 593 ; *Maberry v. Shisler*, 1 Harrington (Del.) 349 ; Burrill on Assignments, 2d Ed., 363-5, 370 ; *Van Buskirk v. Hartford Fire Insurance Co.*, 14 Conn. 587.

This preference by a State of its own citizens to those of a sister State may seem illiberal, and if the question were *res integra*, might possibly not receive the approbation of this court.

But we feel confident that if this court ever abandon this ground, it will not recede to the narrow and exclusive position of the plaintiff's counsel, but, on the contrary, will advance to the broad and liberal ground of the Pennsylvania court in the cases from that State above cited, which recognizes in its fullest extent the great fundamental principle characterizing personal property, the application of which we claim to this case, and considers it subject to no exception in favor either of foreign or domestic creditors, unless it has been expressly and unequivocally repealed by legislative enactment.

It is claimed by the plaintiff that there is a distinction, as to the operation of a law like that of 1852, between debts due from a citizen of this State to a citizen of another State, and tangible personal property situated here but owned in another State, and while it is admitted that that law is not applicable to the former kind of property, he insists that it does operate upon the latter.

This position is indeed supported by the *obiter dicta* of STORRS, J., in *Atwood v. Protection Insurance Co.*, 14 Conn. 555, but it is contrary to the common law, which makes no distinction between these two kinds of personal property, as to their being controlled by the *lex domicilii* and the *lex loci contractus*. It is also directly opposed to the following cases: *Whipple v. Thayer*, *Daniels v. Willard*, *Burlock v. Taylor*, all in 16 Pick. ; *Mallory v. Snow and Trustee*, Law Reporter 1858, p. 431 ; *Law v. Mills*, 18 Penn. St. 185 ; *Merchants' Bank v. Bank of United States*, 2 Louis. Ann. 659 ; *Richardson v. Leavitt*, 1 ib. 430 ; *United States v. Bank of United States*, 8 Robinson (La.) 262.

REDFIELD, Ch. J. The general question involved in this case is one of a good deal of practical importance, and one in regard to which there is obviously more or less conflict among the decisions in other States.

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There are some points in regard to which we think there is no just ground of controversy. We see no good reason why any different rule should be applied to this case, because of the extent and variety of the property involved. It would be difficult, if not impossible to define a rule upon this subject resting upon any such basis. All would agree, we believe, that if the assignor had been a resident of the State, at the date of the assignment, and had gone out of the State for the purpose of making the assignment, or, being temporarily out of the State, had made the assignment, in either case it must still be governed by the requirements of our law in relation to such contracts. Any other view would operate as a virtual fraud upon the law.

But if the assignor has a bona fide residence out of the State, we do not perceive why his contract of assignment may not with the same propriety be held to convey his interest in this mercantile partnership as in any single article of personal property within the State, or a chose in action owing from one resident here.

We feel that there can be no question in regard to the right of the legislature to restrict and limit the freedom of alienation of personal chattels or of choses in action within the State, or to prohibit it altogether, or even to provide for its escheat to the State, after the decease of the present proprietors, unless restricted by constitutional limitations. And by parity of reason the legislature must have the right to prescribe any formalities in the conveyance of personal property, which they may deem expedient, and to make them universal in their application to all who hold property here, as well those residing without as within the State. There can be no doubt of the power of the legislature in this respect. That was never questioned.

But it has long been the policy of commercial States not to embarrass the free transmission of the title to personal property. And it has been very justly considered as discourteous and illiberal policy in one State to abridge and fetter the operation of foreign contracts within its limits, or to refuse to enforce them by suits maintained in its courts, or to embarrass foreign owners of personal estate within its limits, in the free enjoyment of its beneficial use, or its ready and unrestricted conveyance. Hence courts have long felt a reluctance to establish any restrictions of

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this character by means of construction merely. But where such is the fair and reasonable interpretation of a statute, the courts can feel no delicacy and no reluctance in the matter.

I. The great and leading question made in the argument of this case is, whether the statute of 1852, in relation to assignments for the benefit of creditors, was meant to apply to all such contracts intended to operate upon personal property within the State wherever such assignments might be executed. It must be very obvious to any one examining the special provisions of the statute of 1852, that it could only have been intended primarily to apply to cases where the assignor resided within the State, and where the assignment was to be here carried into effect by the assignees. By the third section it is made the duty, both of the assignor and the assignee, to file in the office of the county clerk, "in the county where the assignment is made, and the property assigned is situated, a true copy of the assignment and of the inventory," etc. By the sixth and seventh sections, provision is made for compelling the assignee to give account of his administration of the trust by proceedings before "the chancellor of the circuit." None of the provisions in these sections, which constitute one third of the statute, could have any possible application to an assignment made out of the State. The statute without these provisions would be a very lame and imperfect affair. And the fifth section, which provides for the assignee filing with the "clerk of such county" a "copy of the settlement of his trust account," must also be regarded as having exclusive reference to transactions conducted within the State. It is, therefore, sufficiently obvious that this statute could not have been intended primarily to apply to assignments made, and to be carried into effect without the State. It seems to me as obvious that this statute was not intended to apply to assignments made out of the State, as if the statute had in terms provided that all assignments hereafter made *in this State*, etc.

But it may still be urged that this statute must be regarded as applicable to all property within the State, personal, as well as real. But it seems to us that as no such thing is expressed in the act, it would be contrary to the general policy of commercial States to adopt such a view by construction merely. The inclin-

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ation of courts and the general policy of the law is certainly otherwise.

In the law, personalty is generally regarded as having no *situs*. Its title, mode of transfer, and other incidents connected with its use and transmission, are regulated according to the law of the place of the domicile of the owner. This is confessedly true in regard to the requisite formalities in the execution of a will of personalty, although essentially departing from the requirements of the law of the State where such property happens to be situated at the time of the decease of the owner. It is the law of the place of the domicile of the owner which must control these incidents, as to the operation of wills upon personal estate, and also the distribution of intestate estates, according to the general rules of international comity among civilized and commercial States. There can be no doubt of the right of any State to interfere in these matters, even to the extent of prohibiting the operation of foreign wills within its limits. But that is seldom attempted in modern days.

But it is claimed that in regard to the distribution of one's effects (while living) among his creditors, a different rule to some extent has prevailed. This may be true perhaps. One State is not bound to send property, found within its limits, abroad to be administered upon, either by assignees, whether voluntary or compulsory, or by personal representatives after death, so long as there are creditors within the State who would thereby be deprived of an equal share with the creditors in the place of the domicile of the debtor. This is the express rule of this State in regard to insolvent estates of deceased persons domiciled abroad. And we see no reason why, upon general principles, we might not expect the same rule to obtain in regard to the effects of living insolvents. But there are, no doubt, many considerations to be taken into the account in determining such a question. It has been held that in giving effect to an assignment for the benefit of creditors made out of the State, we act upon considerations of comity merely. This must undoubtedly be received with some qualification. It is certainly not true that we could regard the binding effect of such an assignment, in regard to personal property remaining within the State, as dependent upon the ques-

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tion, whether the State where such assignment was made would give effect to an assignment made in this State, as to property in that State. That would certainly be a very narrow and unmanly view of the subject. For this might result merely from a misconception of the law by the courts of that State, and a misapplication of the principles, which, according to the generally admitted doctrines of commercial law, ought to have controlled the question. The view proposed would then amount to nothing less than the law of retaliation, the *lex talionis*; SHAW, Ch. J., 19 Pick. 107.

The only ground which could fairly justify the courts of one State in refusing to recognize such contracts made in other States, by persons domiciled there, as matter of comity, must have reference either to a general want of confidence in the mode in which the general principles of commercial law are there administered, which is but another name for the character and standing of such State in regard to civilization and christianity, or it must have reference to the manner in which we suppose our citizens would be affected by sending them into the *forum* of that State, for the recovery of their claims against the assignor in the particular case.

We think this State or any christian State might perhaps fairly be justified in refusing to send its own citizens into Japan or China to obtain payment of a claim against a person domiciled there, and who had there made an assignment of his effects, provided these citizens could obtain payment of such claims, through the attachment and sale of the property of such debtor, remaining in the State where the creditor resided.

And if any of the American States make, by their general laws, such a discrimination in favor of their own citizens in the distribution of the effects of insolvents, either living or dead, as to amount to a virtual denial of justice or of equality of right in such distribution to our citizens, we might fairly claim to apply such property of the insolvent as was found in this State, to the payment of such debts as were owing to our citizens. Beyond this it does not occur to me that, upon principle, we could fairly be justified in making any discrimination in favor of one of our citizens. And neither of these grounds would ordinarily find any

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basis for their application, in regard to assignments, made in any of the American States.

The ground upon which courts in one State have refused to give effect to *involuntary* assignments, made in foreign States under the insolvent and bankrupt laws of such countries, is sufficiently justified upon the ground that such assignments are affected by the judgment of the courts of such foreign States, which can of course have no effect, either upon persons or property, in other States, of which they have no jurisdiction, unless it is effected by transferring such property or persons into the States where such courts exist, and thus giving a sort of *ex post facto* jurisdiction. This is sometimes done by persons abroad coming into the insolvent court, and presenting their claims, and accepting a dividend upon them with the general creditors. This makes the discharge a bar to such claims, although the court would have had no jurisdiction over them if they had not been voluntarily presented; *Peck v. Hibbard*, 26 Vt. 698. As to the general principle that involuntary assignments under foreign bankrupt and insolvent laws are not binding upon persons or property situated without the States where made, the cases of *Harrison v. Sterry*, 5 Cranch. 289; *Hoyt v. Thompson*, 1 Selden 320; *Britton v. Valentine*, 1 Curtis 168; and 2 Kent's Com. 405-408, and the cases cited by the learned commentator, will be sufficient. The doctrine is most unquestionable, and rests upon grounds entirely aside of those affecting voluntary assignments, that is, upon the want of jurisdiction in the courts making the judgment of compulsory assignment.

In regard to general voluntary assignments for the benefit of creditors, it seems to be an admitted rule, that if according to the laws of the place of the domicil of the assignor, they will have the effect to pass all the personal property of the assignor, wherever situated, unless their operation is limited or restrained by some local law or policy of the State where the same is situated; Story's Conflict of Laws, sec. 428 (a.); Burrill on Assignments, 863 *et seq.*

In the second edition of Burrill on Assignments, a thorough and exhaustive digest and analysis of the cases upon this subject will be found, pp. 363-372. A careful review of the cases shows

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very clearly that the preponderance of authority is greatly in favor of the general view above stated. This examination could scarcely fail to bring all fair minded persons to the same conclusion with this careful and painstaking writer. This author says that in all the cases where a voluntary assignment, valid where made and operative by the laws of the place of the domicil of the owner to transfer personal property everywhere, has not been held to have that effect, as is the fact in some few of the American States, it has been only in favor of the citizens of the States where such decisions have been made. "As against citizens of other States and especially as against citizens of the State where the assignment was made, the rule appears to hold without qualification, that an assignment, valid by the laws of the State in which it is made, is valid everywhere." This limitation of the exception would narrow its operation so as not to include the plaintiff's claim in the present case, he being not only not a resident of this State, but being a resident of the State of New York, where the assignment was made, and the assignor domiciled at the time, and by the laws of which State it is entirely valid to transfer all the personal property of the assignor wherever situated.

We do not desire, however, to have it understood that we are willing to place our decision upon any such narrow ground. We regard that class of cases which have assumed this ground in regard to the citizens of the other American States, by way of a narrow and specific retaliation, or what is still more ungenerous, for the purpose of giving their own citizens an unequal advantage, as resting upon no enlarged and liberal notions, either of national or general policy. This is the view maintained by SHAW, Ch. J., in *Means v. Hapgood and Trustee*, 19 Pick. 105-107. It is there said "courts of law are competent to take notice of general considerations of comity; but it is not, we think, within their province to attempt to enforce a precise system of retaliation, by adopting the precise rules against their citizens, which their courts adopt against ours." The very least which could fairly justify our courts in discriminating in favor of our own citizens, would be the certainty that the courts of the State, where the assignment was made, would do so in regard to their own

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citizens, and thus deprive our citizens of that equal justice, which they are entitled to demand and to expect in all civilized and commercial States. One may be compelled to do this as to barbarous and pagan States. We trust Vermont will only do it, in the strictest sense, or by way of necessary self defence.

The principle of the leading case in Massachusetts, *Ingraham v. Geyer*, 13 Mass. 146, where the rule of discrimination in favor of their own citizens, as to voluntary assignments of insolvents made abroad, is first attempted to be maintained, is virtually condemned by the same court in the case of *Means v. Hapgood*, 19 Pick. 107, when it came under consideration as the decision of a neighboring State. SHAW, Ch. J., there says, that the case of *Fox v. Adams*, 5 Greenleaf 245, "has been repeatedly doubted in this State." And this last case was decided expressly upon the authority of *Ingraham v. Geyer*, and is in principle the same.

All the other cases in the American States, where voluntary assignments made in other States have been held inoperative against the attachment of personal property by citizens of their own States, have gone upon the narrow and illiberal policy of giving their own citizens an advantage over those of other States. That has sometimes been alluded to by our own courts, by way of argument or illustration, but it has not obtained countenance of late, and certainly ought not to be encouraged, unless in strict self defence.

The authority in the opposite direction is of far greater amount, besides resting upon grounds which commend themselves both to our sense of justice and consistency with principle; *Caskie v. Webster*, 2 Wallace, Jr. 131; *Law v. Mills*, 18 Penn. St. 185; *United States v. Bank of United States*, 8 Robinson (La.) 262; *Dundas v. Bowler*, 3 McLean 397.

The Massachusetts court has, in many instances, and in comparatively recent times, (*Zipcey v. Thompson*, 1 Gray 243,) repudiated the notion of giving effect to voluntary assignments by insolvents when they operated against their local legislation, or to defeat attachments made by their own citizens, but they assign no grounds or reasons for such a course which would not equally justify that State in disregarding all foreign contracts which

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seemed unfavorable to their interest, or not in strict conformity with the special provisions of their local law.

In Connecticut, in *Atwood v. Protection Insurance Co.*, 14 Conn. 555, such assignments are held valid to pass property in that State, although not conforming to the specific requirements of their law, very similar to many of the requirements of our assignment law of 1852. So also in New Hampshire, *Sander-son v. Bradford*, 10 N. H. 260.

We have thus disposed of all which could fairly be urged in favor of holding the trustee liable, in this State, unless it be the claim that these provisions of our assignment law must be regarded by our courts as something pertaining to the settled policy of the State, in regard to the disposition of the effects of insolvents among their creditors, or else that it was meant to attach to all such contracts intended to affect property here situated, wherever made.

But we think there is no plausibility in adopting either of these views. We have said that these provisions of the statute are of a character to indicate very clearly that they were designed to have operation only upon assignments made within the State. And they do not indicate any purpose of being applied to the property conveyed, instead of the contract. They are regulations affecting a particular class of contracts, and not the general mode of transferring personal property for the benefit of creditors. There is more plausibility in the argument which attempts to apply them to all assignments of property for the benefit of creditors, than in that which would make them a portion of the fixed policy of the State, in regard to the disposition of property for the payment of debts of insolvent persons, whenever such property is found in the State, like, for instance, our rule of law requiring a delivery of the property in order to put it beyond the reach of process. The Louisiana cases cited go upon this ground. But we are not prepared to adopt this view even.

In every view which we are able to take of the case we think the trustee was properly discharged, and, consequently, the judgment is affirmed.

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RICE & DANENBAUM v. STACY COURTIS.

Conflict of laws. Assignments for the benefit of creditors. Attachment. Sale.

The local rule of policy established in this State, requiring a complete change of possession, in cases of the transfer of personal property, in order to exempt it from attachment upon process against the transferor, is universal in its application to all personal property actually within the State; and it therefore applies to and governs the transfer of such property, though it be owned by a resident of another State, and be there transferred in conformity with the laws thereof, which do not require such a change of possession to exempt such property from such attachment.

The modification of this rule as applicable to property, which, at the time of the transfer, is in the hands of a third party, is as much a matter of local policy as the principal rule itself, and a full compliance with it is equally requisite, in all cases of the transfer of personal property within this State in the hands of a third person, to prevent its attachment upon process against the transferor.

When property in the possession of a third party is assigned, mere notice, from the assignee to such third party, of the assignment is not sufficient to prevent its attachment upon process against the assignor.

It seems to be indispensable in order to remove the liability of property so situated to attachment as the property of the assignor, that the assignee should make the person, having it in his possession, his bailee; that the latter should consent to hold the property for the assignee. This consent would undoubtedly be inferred from the silence of the bailee upon a request being made upon him by the assignee to keep it for him. REDFIELD, Ch. J.

The right to attach personal property which has been transferred without a compliance with the rule of policy of this State, requiring a change of possession, is not confined to the mere *creditors*, in a technical sense, of the vendor; but it belongs to all those who seek to enforce any right or claim against him by means of the process of attachment.

TRESPASS for a quantity of dry goods, and a horse, sleigh and harness. Plea, the general issue, and trial by jury, at the March Term, 1859, — BENNETT, J., presiding.

On trial it appeared that the property in question, on the 17th of December, 1856, and previous to that time, was owned by William Cane and Marcus Cane, and was then in the possession of the latter at Vergennes and New Haven, in this State, he being a peddler, and being then engaged in peddling the goods in

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Vermont, and using the horse, harness and sleigh in that business.

On that day William Cane and Marcus Cane, who were domiciled and doing business in the city of New York, being insolvent, made in that city an assignment to the plaintiffs, also residents of New York, of all their property for the benefit of their creditors, certain of whom were preferred in the assignment, and among them the plaintiffs. This assignment was not executed by Marcus Cane at that time on account of his absence in Vermont, but it was afterwards executed by him in New York, on the 20th of December, 1856.

The property in question, in this State, constituted but a small portion of the property embraced in the assignment, the remainder being all in New York.

The assignment was in all respects in conformity with the laws of New York, and it was admitted by the defendant that if it were to be controlled as to this suit by those laws, it was valid against all parties to pass the property in question to the plaintiffs. But, on the other hand, neither the assignment nor the course pursued by the plaintiffs under it, were in compliance with the statutes of 1852 and 1855, relating to assignments for the benefit of creditors, if being general and not specific in its terms, the assignees being creditors, and no copy of the assignment, nor any bond having been filed by the assignees in any county clerk's office or probate court, respectively, as required by those statutes.

On the 18th of December, 1856, immediately after the execution of the assignment by William Cane, the plaintiff, Danenbaum, came to Vergennes, in this State, where Marcus Cane then was with the horse, harness and sleigh, and the greater part of the goods in question, the remainder of them having been left by him the day before at New Haven, in the charge of one Stow. On his arrival at Vergennes, on the 19th of December, Danenbaum took possession of all the property there belonging to the assignors and sent a messenger to Stow, at New Haven, to inform him that the goods left in his charge by Marcus Cane had been assigned to the plaintiffs. The messenger delivered this message to Stow on the 20th of December, 1856, and also told him that Danenbaum had directed him so to inform him.

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Danenbaum, after having taken possession of the property at Vergennes and sent this message to Stow, placed the property in Vergennes in the charge of a third person, and returned to New York with Marcus Cane. He took no further steps in relation to any change of possession, or notice to Stow of a change of title in respect to the goods at New Haven, than are above stated.

On the 2d of January, 1857, the defendant, who was a resident of Massachusetts, caused the property in question, which still remained at Vergennes and New Haven in the same position as when Danenbaum left the former place for New York, to be attached and taken upon a writ in his favor against Marcus Cane and William Cane, in an action of trover, which suit, at the time of the trial of this cause, was still pending in the courts of this State.

Upon these facts, the county court directed the jury to return a verdict for the plaintiffs for the value of all the property in question, both that at Vergennes and that at New Haven, to which the defendant excepted.

L. E. Chittenden, for the defendant, claimed, first, that the assignment did not operate upon the property in question because it was not in conformity with the statutes of this State, passed in 1852 and 1855, relating to assignments for the benefit of creditors, and cited on this point the same authorities as those cited by the counsel for the plaintiff in the case of *Hanford v. Paine and trustee*, ante p. 442; secondly, that if the assignment were operative, notwithstanding those statutes, still there was no such possession taken by the assignees of the property at New Haven, as was necessary under the settled policy of this State, to protect it from attachment as the property of the assignors. The message from Danenbaum to Stow was, at best, a mere notice to the latter of the assignment, without any undertaking on the part of the bailee to keep the property for the assignee, or even a request from the assignee to him that he would do so; *Whitney v. Lynde*, 16 Vt. 579.

George F. Edmunds and *William G. Shaw*, for the plaintiffs

1. The assignment in question is not affected by the laws of

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Vermont, either the statutes of 1852 and 1855, relating to assignments for the benefit of creditors, or the common law principle of this State, requiring an actual change of possession to exempt the property from attachment in suits against the assignors. The assignment was purely a New York assignment, the parties to which were all residents of New York, and the great bulk of the assigned property situated there. It is therefore to be governed by the laws of New York, as to all the personal property embraced within its terms, even though a portion of it was at the time within this State. By the laws of New York the case finds that the assignment was in all respects valid to pass the property in question fully to the plaintiffs.

In support of these views we cite the same authorities relied on by the counsel for the trustee in the case of *Hanford v. Paine and trustee*, ante p. 442.

2. But even if it be a settled rule of policy in this State, applicable to all personal property within its limits, without regard to the domicil of the owner, or the place where he makes a contract transferring it, that there should be a complete and actual change of possession, in order to exempt it from liability to attachment as the property of the assignor, still this law, or policy, of this State was fully complied with, even in regard to the property at New Haven.

The strict rule of constructive fraud, grounded upon a retention of possession by the vendor after sale, does not apply to cases where the property is in the hands of a third person. The rule is wholly one of policy merely, and has been sustained only on account of the frauds which it is supposed would be the consequence of its abrogation. These frauds consist in the deceit and imposition to which the public would be subject in regard to the ownership of the property. It is a natural presumption that personal property belongs to the person who has the possession of it; and the law has made this presumption a conclusive one where the owner of personal property retains possession after he has sold it; *Judd v. Langdon*, 5 Vt. 235. But it is neither a natural nor reasonable presumption to suppose that property in A.'s hands belongs to B., and even if one does think so, he has no right to act upon such an idea, until he has made proper and

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reasonable inquiries into the true condition of the title. The public being thus put upon inquiry in such cases, all that is necessary to be done to make a valid assignment, is to give the depositary such information as will enable him to disclose the facts on inquiry being made of him. This is fully accomplished by a notice from the vendee of the sale to him. There need be no express request from the vendee to the bailee to hold the property for him. That is implied from the notice of the sale; *Carter v. Willard*, 19 Pick. 1; *Peirce v. Chipman*, 8 Vt. 334; *Harding v. James*, 4 Vt. 465, WILLIAMS, J.; *Merritt v. Miller*, 13 Vt. 419; *Potter v. Washburn*, 14 Vt. 564; *Shephard v. Briggs*, 26 Vt. 153; *Knowles v. Horsfall*, 7 Eng. Com. Law 46; *Tucker v. Ruston*, 12 *ib.* 38; *Harmon v. Anderson*, 2 Camp. 243; *Hutchins v. Gilchrist*, 23 Vt. 87; *Gibson v. Stevens*, 8 Howard 384.

3. Curtis was not a creditor of the assignors within the meaning of the statute of 1852. His claim was merely for damages for a tort, and his action was trover; *Beach v. Boynton*, 26 Vt. 736; *Fox v. Hills*, 1 Conn. 300-3-4-7; *Fowler v. Frisbie*, 3 Conn. 320; *Paul v. Crooker*, 8 N. H. 288.

The word "creditors" occurs in the 1st, 2d, 3d, 6th and 8th sections of the act of 1852, and in all these instances the meaning is plainly such as would exclude the defendant. There is no reason why the word should have a different meaning in the 4th section. See also act of 1855, p. 15.

REDFIELD, Ch. J. The main question involved in this case is the same as that just decided in the case of *Hanford v. Paine and trustee*. But there is here the further question, whether any change of possession is requisite in order to put property in this State, when assigned for the benefit of creditors by an act done legally out of the State, beyond the reach of the process of our courts against the assignor.

The only ground upon which it is urged that such a change of possession is required in order to perfect the assignment when made out of the State is, that this is a rule of policy uniformly required in the transfer of all personal property within the State as a visible index of its being no longer liable upon process against the former owner; that it is no part of the contract of assign-

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ment, to be controlled by the law of the place of assignment, but a matter purely of local policy, to prevent fraud, and therefore not a matter to be controlled by the contract, or by the law governing the contract, but a local form or act to be governed by the law of the forum where the property is situated and the remedy sought.

There is no doubt of the existence and universal recognition of such an exception to the operation of foreign contracts, valid by the law of the place where made. The rule is more commonly illustrated by foreign contracts affecting religion, morals or State policy, the enforcement of which, in our courts, would be of evil example to our citizens. We may suppose the case of an action to recover damages for some failure to perform a recognized duty by the priest or other officials connected with the sacrificial rites of the pagan religion, in some country with which our Republic maintains friendly diplomatic relations, or some proceedings to enforce contracts for the endowment of pagan temples, or the maintenance of the general institutions of the faith of some country not christian. The trial of such an action would involve, of course, the examination and comprehension, to some extent, by the jury, of the general subject matter, which could scarcely fail to produce a corrupting influence upon the citizens of a professedly christian country.

The same course of reasoning will illustrate the impropriety of giving relief, by way of action, for the non-performance of contracts made in a foreign country, affecting duties and obligations, when their sense of propriety is in conflict with our own. For instance, contracts for the destruction of one's parents, or for prostitution, or for the maintenance of fifty wives, which is much of the same character with prostitution, according to our views, may all be held perfectly valid in some countries. We all understand that such has been the case in some countries during the world's history. Still, no one would expect to maintain an action here founded upon any such consideration. It would be revolting to the public sense.

The same is true in regard to transactions in conflict with some statutory provisions affecting public police, such as gambling, horse racing, and the unrestricted sale of ardent spirits,

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when the transactions forming the basis of the contract, have, in any respect, transpired in this State. So, too, in regard to matters affecting trade and merchandize merely, as the inspection of leather, for instance, the violation of any statutory requirement is sufficient ground for denying all remedy upon contracts based upon such consideration, although the article sold here may be of the most perfect quality, far above the statutory requirement.

It is now claimed that the requirement of a change of possession in the transfer of personal property, in order to put it beyond the reach of the process of our courts against the former holder, is a matter so far affecting the settled policy of our jurisprudence upon the subject, that it cannot be dispensed with, out of deference or comity to the law of any other State. This case is not as obvious as some of those already stated.

It does not depend upon the question whether the rule of policy which is contravened by a foreign contract is of a statutory character or one established by the decisions of the courts. It depends upon the point how far it is a matter affecting the settled and uniform policy of the State, so as to be applicable to all similar transactions without the State, something local and permanent, pertaining to the local policy of the forum, which is not transitory or a thing pertaining to the contract. If it be of this character, it can no more be dispensed with out of deference to the law governing a foreign contract, than could the institutions of religion or the fundamental principles of morality.

The subject may be illustrated by the contract of sale. The contract itself must be so executed as to be valid by the law of the place where made, in contemplation of the courts. That is commonly the law of the place of the domicile of the seller, unless the contract is made with reference to the law of some other place. It is not always the law of the very place where the contract is in fact made, but the law with reference to which the contract is presumed to have been made, that governs the incidents of the contract itself, and determines their extent and validity. But the contract, when made in conformity to these incidents, will be effectual to transfer the title of things personal, wherever situate, unless it contravenes some requirement of the local law which affects the transfer of all similar property within

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the jurisdiction. If the requirement affect the contract merely, as, for instance, that it be in writing or under seal, it will not extend to contracts executed in other States. But if it be something adhering to the property itself, then it will affect all contracts in relation to such property, wherever made. As, for instance, those regulations in regard to assignments for the benefit of creditors, in the act of 1852, if made to apply to all personal property within the State, could not be dispensed with, even in reference to assignments made out of the State. But as they were made to attach only to this particular class of contracts, they are only binding with reference to such contracts made within the State, or by an assignor domiciled within the State at the time.

There is no doubt this requirement of change of possession is a rule of policy, to a considerable extent, and one which in this State has been regarded of very essential importance to the security of good order and the just rights of our citizens. It is, too, a rule which is made to apply to all personal property which is liable to attachment, whether in the ordinary mode or by process of foreign attachment. There is no other similar requirement which is made to attach to the property, and to all personal property liable to attachment and not to the contract of transfer.

We say indeed, sometimes, that the sale, without a change in the possession, is not perfected as against creditors. This is not precisely accurate. What we mean is, that the property is still liable to attachment upon process against the former holder, because an act has been omitted which is indispensable to release it from that liability. And this is an act affecting the rights under process only. We thus make the provision virtually a part of the process as to all personal property permanently located in this State, and not by statute exempt from process. It thus becomes a matter governed exclusively by the law of the forum.

It is true, that out of comity we do not apply it so as to defeat rights acquired in other States, as to property having its locality there. This would be to work fraud and injustice, and offensively to divest rights acquired *bona fide* under the laws of a foreign State; *Taylor v. Boardman*, 25 Vt. 581; *Jones v. Taylor*, 80 Vt. 42.

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The requirements of the statute exempting one's last cow from attachment was held to be a matter pertaining to the remedy, and as such, extending to all process, whether *mesne* or final, within the State, whether the defendant or debtor resided within the State or not, or whether the property be permanently within the State or only came here casually; *Haskell v. Andrus*, 4 Vt. 609. And property exempt by statute from process may be legally transferred, as to all the world, without any change of possession; *McGregor v. Stiles*, 11 Vt. 375. This statutory exemption being in effect a part of the process, the requisite change of possession in regard to property not exempt, is thus something affecting the process itself, as it seems to us, rather than the contract of transfer.

It is not indeed so far a part of the process as to divest rights already acquired in other States, in reference to property casually coming within our jurisdiction. That would be to apply the process to property exempt from its operation, both by the contract of the parties and the law of the place where the property is situated.

But whether we call it a part of the remedy and a matter pertaining to our process, which to some extent it must be regarded, or call it a universal rule of policy in regard to the transfer of personal property situate within the State and having a place of more or less permanency here at the time of the transfer, so far as the right of attachment is concerned, it has been sufficiently shown already, that the requirement has its chief reference to, and operation upon, the rights of those who desire to attach or levy upon it with a view to enforce legal remedies.

This view sufficiently disposes of the distinction attempted to be made between the rights of this defendant to hold this property, because of the want of change in the possession, and the case of a strict and technical creditor, which the defendant probably is not, according to the usual definitions of that term. This change of possession is requisite to defeat the right to attach or to levy upon the property, and is not limited to the case of creditors, although in popular language it is more commonly so expressed. Our books abound with the expressions, that a *bona fide* sale without a change of possession is not valid as against

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creditors. But to be strictly accurate it should be said, that such sales do not prevent the property from being attached upon process against the vendor.

And that this is the real point of the doctrine is made apparent by the consideration that one may attach property in this State so situated, notwithstanding he may have full notice of the transfer, and have no reason to doubt or question its perfect fairness and adequate consideration. But in regard to subsequent purchasers the rule is otherwise. They cannot ordinarily purchase and hold property, although they first obtain the delivery, if, at the time of the purchase, they had full notice of a *bona fide* sale to another and the payment of the price. Such a purchase is not regarded as *bona fide*. This is certainly the rule of the English law. The statute of the 27 ELIZABETH only extends to voluntary conveyances. By the English law, as at present understood, a creditor who has knowledge of a *bona fide* sale of property by his debtor, and the payment of the price, which would change the title as between the parties to the sale, cannot justify attaching the property. But in this State we regard the want of change of possession as a fraud in law, so far as the processes of our courts are concerned. To that extent it is the same as if no sale had been made. And we have applied this rule to all personal chattels remaining within the State at the time of transfer and not exempt from attachment, and to all modes of transfer, whether of the absolute title or the creating of a lien by way of pledge, a mortgage or by assignment for the benefit of creditors. So that it will be necessary to show such change of possession in the present case, in order to enable the plaintiffs to hold the goods against the defendant's attachment. The proof in this case shows merely notice to a third party, in whose possession the assignee had placed the goods, as to that portion of them at New Haven. This would be all that is required by the English law to effect a change of possession; Chitty on Contracts 412, a. But in this State something more is required. It seems to be indispensable, in order to defeat the right of attachment, that the vendee should, in such case, make the person having the goods in his possession his bailor; that he should consent to hold the goods for him. This might be inferred,

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undoubtedly, from the silence of the bailee, if he was requested to keep them for the vendee. But nothing of that appears in the present case. The rule laid down in *Whitney v. Lynde*, 16 Vt. 579, has been always adhered to in this State, so far as I know.

We are not aware that this rule in regard to the necessity of change of possession, in order to exempt property sold or assigned from attachment, exists, at present, in any other one of the American States. That was the rule in many of them for many years, but after the change of the rule in England it gradually changed in this country, until it has now become universal, out of this State, to regard the want of change of possession, before the attachment, as, at most, presumptive evidence of fraud, and in many of the States, and probably most of them, at the present time, it is merely evidence of fraud. In that view it would not defeat the plaintiff's title that they had not taken possession of the goods before the defendant's attachment, if they could satisfy the jury that the omission to take possession was consistent with the *bona fide* character of the assignment. But with us the decisions have been uniform to require a visible, substantial change of possession to perfect an assignment against attachments, and it has so far become a part of the settled policy of the State, and seems to us so far connected with the remedy, that, as to property within this State, we could not feel called upon to give an assignment for the benefit of creditors, made in another State, priority over an actual attachment of the property by the process of our courts, without such change of possession. Notwithstanding the validity of the foreign assignment to transfer the property here, we must regard it as still liable to be arrested by the process of our courts, until the assignment is carried into effect by the delivery of possession to the assignee, or his taking such possession. This act of possession is a local act, and its validity is to be determined by the law of the place where it occurs. It attaches to the forum rather than the contract, and is a matter affecting local policy, which no rule of comity could fairly justify us in disregarding out of deference to the law of the place of the domicile of the assignor, even if it were shown that the law of New York did not require such delivery in order to perfect the assignment as against attachments. But that does

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not very clearly appear. It may still be the law of that State that the same change of possession is requisite to perfect an assignment there as here. But it is enough that such is the law here ; see the cases on this subject digested in *BURRILL*, chap. XXV.

● In making this discrimination between the contract and the delivery or change of possession, we but carry out the same rule which we should apply to the ordinary contract of sale, where the property was within the State and the owner resided abroad. Any contract of sale valid by the law of the place where made, or where the vendor resided, will transfer the title of the property. But the vendee must here take actual possession, before the property is beyond the reach of process against the vendor. We hold the same in regard to assignments for the benefit of creditors. And we have always applied the same rule in regard to the assignment of choses in action. We do not regard the assignee as having perfected his priority against the process of foreign attachment against the assignor, until he has given notice to the debtor. This is different from the rule which obtains in New York, and in some, probably most, of the other States. It is there held that the assignment transfers the title, and if it is subsequently attached, by way of foreign attachment, even before notice of the transfer to the debtor, the assignment will take priority, if it be made to appear on trial that the assignment was in point of fact prior to the service of the attachment. But in this State the assignment is only regarded as perfected against attachments when notice is given to the debtor, that being regarded as equivalent to a change of possession, and an indispensable prerequisite, in order to put the property in choses in action beyond the reach of the process of foreign attachment against the assignor. This rule of law, in regard to choses in action attached by process of foreign attachment, has been adhered to with great strictness in this State, from the earliest times. And we are not aware that it has ever been relaxed. It has sometimes been regarded as an anomaly, and the courts have hesitated in regard to it. But upon examination it will be found to form an essential portion of our law, requiring a change of possession to perfect an assignment, as against the process of our

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courts, in favor of persons having rights of action against the vendor.

As no sufficient change of possession was clearly shown in this case as to a portion of the property, and that question was withdrawn from the jury, the judgment is reversed and the cause remanded.

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WILLIAM P. BRIGGS v. ROLLA GLEASON.

Practice.

A party who has set a cause down "not for the jury," and has failed to show to the court a good cause of continuance, is not entitled to have the damages assessed by the jury.

ALDIS, J. The plaintiff set the case down "not for the jury," which means, by long settled practice, that he shall show good cause for a continuance, or submit to a judgment against him.

After thus setting the case down, has he the right to have the damages assessed by the jury? We think not. He thereby declares of record that there is nothing in his case which he claims to have tried by jury. If damages are to be assessed he thereby waives the assessment of them by the jury, and submits that question to the court. This construction has, we believe, been uniformly given to this entry throughout the State.

Strictly speaking, in ordinary cases, there can be no perfect judgment without an assessment of damages. For although it is the frequent practice of the courts to enter judgment and continue the case for the assessment of damages, still, such judgments are only *interlocutory*, like judgments by default, or *nul dicat*, and are not complete till the damages are assessed. The entry, "not for the jury," implies, if there is no cause for continuance, that the party shall have a perfect judgment without the intervention of a jury.

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ELEAZER R. HARD, *Administrator of the Estate of* ADIN N. FRENCH, *deceased*, v. THE VERMONT AND CANADA RAILROAD COMPANY.

Railroads. Master and servant.

The plaintiff's intestate, who was an engine driver on the defendants' railroad, was killed by the explosion of the locomotive which he was running, which explosion occurred in consequence of the neglect of the defendants' master mechanic to keep the locomotive in repair. The duty of this master mechanic was to superintend and direct the repairs of all the locomotives on the defendants' road. The directors of the defendants were not guilty of any neglect in furnishing their road in the first instance with suitable machinery and faithful and competent employees, and they were ignorant of any defect in the locomotive in question. In an action brought by the plaintiff, as administrator of the engine driver, for the benefit of his widow and next of kin, to recover damages for his death, *held*, that the defendants were not liable.

Though it is the duty of a railroad company to exercise all reasonable care in procuring for its operation sound machinery and faithful and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants, employed in the same general business of operating the road, even though the negligent servant in his grade of employment is superior to the one injured.

CASE to recover damages for the death of the plaintiff's intestate, occasioned, as the declaration alleged, by the explosion of a locomotive which the intestate was running as engineer upon the road and in the employment of the defendants, such explosion being alleged to have occurred in consequence of the defendants' neglect. The action was brought by the plaintiff for the benefit of the widow and children of the intestate.

The defendants pleaded the general issue, and the cause was tried by jury, at the March Term, 1859,—BENNETT, J., presiding.

The evidence introduced by the plaintiff tended to show that the plaintiff's intestate was employed by the defendants as an engineer upon their railroad; that on the day of his death he was, as such engineer, running upon the defendants' railroad a locomotive belonging to them called the "John Smith," when the boiler of the locomotive exploded, thereby instantly killing him; that this explosion occurred in consequence of the defective con-

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dition of the fire box of the locomotive, which had become cracked; that one Morrill was employed by the defendants as master mechanic, and as such had full charge of the locomotives belonging to the defendants, and had the entire direction what locomotives should run, and when, where and by whom they should be run; that it was his duty to see that all the locomotives used by the defendants were kept in repair; that he was guilty of negligence in allowing the locomotive "John Smith" to be run in its defective condition on the day of its explosion, and that such explosion was not occasioned by any negligence on the part of the plaintiff's intestate.

The evidence introduced by the defendants tended to prove (and the plaintiff's evidence showed nothing to the contrary) that it was no part of the personal duties of the directors of the defendants' corporation to make personal examination into the safety of the locomotives in use on their road, and that none of them had any knowledge of any defect in the locomotive "John Smith" previous to its explosion; that that locomotive was built by makers of high reputation in their business; that locomotives from that manufactory were in general use in the New England States, and were of good reputation; that the locomotive "John Smith" had been in use for some time on the defendants' road previous to its explosion; that Morrill had been master mechanic upon their road for some time previous to the death of the plaintiff's intestate; that he was a skilful and competent man for that post; that it was his duty to inspect and keep in repair all the locomotives used on the defendants' road, and that he was always supplied by them with suitable and sufficient men and materials for that purpose.

The defendants, upon this evidence, requested the court to charge the jury, first, that as it appeared that the defendants used all due care in the selection of locomotives and of proper and skilful persons to examine and repair them, and furnished sufficient and proper materials for that purpose, and that it was no part of the business of the directors of the defendant corporation to make personal inspection of the condition of the locomotives, and that none of them either knew of or suspected any defect in the "John Smith," or any negligence in their employees

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having the charge of it, the defendants were therefore entitled to a verdict; secondly, that unless the jury should find, as a fact, that this injury happened from the neglect of the defendant corporation itself, and that the corporation might, by ordinary and reasonable precautions, have known and avoided the cause of the misfortune, the plaintiff could not recover; and that the defendants were not to be charged with negligence constructively, by reason of the negligence of their employees, if, as was not denied by the plaintiff, the company used due care in selecting skilful men and good materials and locomotives; and thirdly, that even if Morrill in this instance was negligent, still, if he was generally a skilful person, and was so regarded by all, the plaintiff could not recover.

The court declined to charge the jury as requested, but, among other things not excepted to, instructed them that if they should find that the locomotive "John Smith" was insufficient and unsafe for use, then it would be necessary for them to inquire whether Morrill was guilty of negligence in suffering it to be run in that condition; that he was guilty of such negligence if the defect in the engine was one which he could have discovered by the use of reasonable care and diligence; that if they should find that he was guilty of such negligence, and that the death of the plaintiff's intestate was in consequence thereof, the defendants were responsible to the plaintiff for such damages as the jury should find were equal to the pecuniary injury which the widow and children of the plaintiff's intestate had suffered by the latter's death, unless the jury should be of opinion that French himself was negligent, and that his negligence had in some way contributed to the cause of his death, in which latter case the jury were told that the plaintiff was not entitled to a verdict.

The jury returned a verdict for the plaintiff for seven thousand dollars.

To the refusal of the court to instruct the jury as requested, and to the instructions given, as above detailed, the defendants excepted.

George F. Edmunds, for the defendants, cited *Noyes v. Smith*, 28 Vt. 59; *Priestly v. Fowler*, 3 M. & W. 1; *Hutchinson v.*

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York & N. R. R. Co., 5 Exch. 343; *Wigmore v. Jay*, *ib.* 354; *Skip v. Eastern Counties R. R.*, 24 Eng. L. and Eq. 396; *Wiggett v. Fox*, 36 Eng. L. and Eq. 486; *Conch v. Steel*, 23 Eng. L. and Eq. 77; *Tarrant v. Webb*, 37 Eng. L. and Eq. 281; *Carle v. Bangor & Piscataquis R. R. Co.*, 43 Maine 269; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49; *Albro v. Agawam Canal Co.*, 6 Cush. 75; *King v. Boston & Worcester R. R. Co.*, 9 Cush. 112; *Hayes v. Western R. R. Co.*, 3 Cush. 270; *Gilshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Bassett v. Norwich & Nashua R. R. Co.*, 19 Law Reporter 551; *Blake v. Ferrin*, 1 Selden 48; *Coon v. Syracuse & Utica R. R. Co.*, *ib.* 492; *Sherman v. Syracuse R. R. Co.*, 17 N. Y. 153; *Boldt v. N. Y. Central R. R. Co.*, 18 N. Y. 482; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. 384; *Shields v. Yonge*, 15 Geo. 349; *Walker v. Bolling*, 22 Ala. 24; *Cook v. Perham*, 24 Ala. 21; *Madison R. R. Co. v. Bacon*, 6 Ind. 205; *Honner v. Illinois Central R. R. Co.*, 15 Ill. 550; *Degg v. Midland R. R. Co.*, 1 Hurls. & Nor. 778; *Vose v. Lancashire, R. R. Co.*, 2 *id.* 648; *Griffith v. Ludlow*, 38 Eng. Law and Equity 477.

E. R. Hard and *J. French*, for the plaintiff.

1. The doctrine established by *Priestly v. Fowler*, 3 M. & W. 1, and followed in numerous cases in this country, does not apply to cases where the servant, whose neglect causes the injury, is superior in employment to the servant who is injured; *Coon v. Syracuse & Utica R. R. Co.*, 1 Seld. 492; *Little Miami R. R. Co. v. Stevens*, 21 Ohio 415; *C. C. & C. R. R. Co. v. Keary*, 3 Ohio St. 202.

2. Morrill was not a co-servant with French. The former occupied the position of *agent*; the latter that of *servant*. In such cases the rule of *Priestly v. Fowler* does not apply; *Wright v. N. Y. Central R. R. Co.*, N. Y. Court of Appeals, 1859; *Little Miami R. R. Co. v. Stevens*, 20 Ohio 415; *C. C. & C. Railway Co. v. Keary*, 3 Ohio St. 201.

3. In all service there is an implied warranty on the part of the principal of the soundness of the machinery which he puts into the hands of his servant, so far as any unsoundness therein may be discovered by the exercise of proper care and diligence;

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and for injury resulting to the servant from the employment of such unsafe machinery by the master, the latter is always liable, unless the servant himself is guilty of neglect; *Redfield on Railways*, 386-9; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49; *Keegan v. Western R. R. Co.*, 4 Selden 175; *Noyes v. Smith et al*, 28 Vt. 59; *Marshall v. Stewart*, 38 Eng. Law and Eq. 1; *M. R. & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541; *Wright v. N. Y. Central R. R. Co.*, *ub. sup.*

PIERPOINT, J. This action was brought under the statute of this State to recover damages resulting from the death of the intestate, who was killed by the explosion of the railroad engine "John Smith," owned by the defendants, and while the intestate was running it on their road and in their service.

From the evidence stated in the bill of exceptions, and the charge of the court thereon, it must be conceded that the jury, in order to justify their verdict, must have found that the accident that resulted in the death of the intestate occurred in consequence of the carelessness or unfaithfulness of one Morrill, (who was the master mechanic in the business of running the defendants' road) in the discharge of his duties as such master mechanic, or in other words, that if Morrill had faithfully discharged such duties the accident would not have happened.

The case shows that it was proved upon the trial, and not contradicted, that it was no part of the duties of the directors of the defendants' road to make personal examination into the safety of the engines in use on the road; that the directors had no knowledge of any defect in the engine "John Smith" before the accident; that it was built by makers of high reputation in their business; that such engines were in general use in New England and of good reputation; that it was Morrill's duty to inspect and keep in repair this and the other engines in use on the road; that he was always supplied by the defendants with suitable and sufficient men and materials for that purpose, and that he was a skillful and competent person for the post he occupied; in short, that the defendants were not directly guilty of any act or of any neglect or unfaithfulness in the discharge of their duties that caused, or contributed to produce, the result complained of.

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If then the defendants are to be made liable at all in this case, it must be in consequence of the carelessness or unfaithful conduct of Morrill, in the discharge of his duties as master mechanic.

It is conceded by the counsel for the plaintiffs, in their argument, that the rule of law is well settled, both in England and in this country, that a servant cannot maintain an action against his principal for an injury which he sustains in the service of such principal, in consequence of the carelessness or unfaithful conduct of a fellow servant. Indeed, the doctrine first enunciated in *Priestly v. Fowler*, has been strictly adhered to in England from that time to the present. It has been almost universally followed in this country, and is expressly recognized in this State in *Noyes v. Smith & Lee*, 28 Vt. 59. And whatever view we may entertain as to the soundness of the reasons on which the rule was originally established, it is now so firmly supported by authority that it would not be wise to overturn it.

But it is insisted that this rule does not apply when the servant whose neglect causes the injury is superior in employment to the one who is injured, or not a fellow servant.

This we think must depend upon the question whether the person injured and the negligent servant are engaged in the same general undertaking or business; whether they are directly engaged in the accomplishment of a common object, to attain which the performance of the duties of each is necessary, and where the performance of the duties of each constitutes a link in the chain of acts that are necessary to produce the desired result.

In the case before us Morrill and the deceased were both engaged in the same general business of running the trains on the defendants' road. It was the duty of one to see that the engines were in a proper state of repair, and to determine what engineers should run the several engines. It was the duty of the other to run the engine of which he was put in charge. Each was independent of the other in the discharge of his own particular duties, and still they were co-servants and fellow laborers in the same general employment, and the nature of the duties of each, and their relation to each other, and the ordinary consequences of the neglect of either upon the other, must have been

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fully understood when they entered into the service of the defendants.

It was the duty of the defendants to see to it that the road was equipped with sufficient, suitable and safe engines, all requisite machinery and materials, and of the necessary quality, and men of the knowledge, skill, care and capacity necessary for the full, perfect and faithful discharge of all the duties that appertain to the positions they severally occupied. For the faithful discharge of this obligation they are holden to each and every person whom they employ in the business of running their road. Each has the right to know and feel that he is associated in the common business with none but those who are faithful, careful and competent. The case finds that this duty the defendants had faithfully discharged.

The business of procuring the machinery, materials and men necessary to equip and run the road, is a business different in its character from that of operating the road after it is equipped. Those who are employed by the defendants to discharge this duty cannot be said to be engaged in the same class of business as fellow servants in the same business with those who are employed in operating the road. It is upon this ground that the case of *Wright v. The N. Y. Central Railroad Co.*, (on which the plaintiff relies) was decided. The court in that case put their decision expressly on the ground that the company were guilty of negligence through Upton, their agent, in employing Adams, the engineer, who, the court say, was incompetent, and not upon the ground of Adams' negligence.

The court in that case say that Upton, who was the agent of the company to employ the engineers, is not to be regarded as the fellow servant of those whom he employs in the general business.

The cases referred to in the Ohio reports can hardly be regarded as authority to establish an exception to the general rule, inasmuch as they do not recognize and act upon the rule itself. And the learned Judge, who delivered the opinion of the majority of the court in the case of the *Little Miami Railroad Co. v. Stevens*, says, that although the facts in the case then under

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consideration differ in some particulars from those in the cases where the rule has been recognized, still he concludes that the principle established in those cases would cover the one then before him.

We do not find any case where the existence of the exception to the rule, which is here sought to be engrafted upon it, has been recognized; and in those cases where the principal has been held liable, it has been on the ground that the business in which the servants or agents were employed was different in its general character and purpose, and where the two, in the regular discharge of their duties, cannot be said to be acting in concert with each other, or in such a way that the duties of each have reference to and directly tend to a common end.

Indeed it is difficult to see where, with reference to the acknowledged rule, a line of distinction can be drawn between the several employees of a railroad company, all of whom are engaged in the active daily occupation of operating the road. The labor of each is indispensable in his particular department to give effect to the joint operations of the whole; the nature of the business requires the road and the machinery to be kept in constant condition to be used, and it must be constantly used. All who are directly engaged in accomplishing the ultimate purpose in view, that is the running of the road, must be regarded as engaged in the same general business, within the meaning of the rule, and perhaps no term more perfectly expresses their relation to each other and the business, than that of fellow laborers in the work.

But it is insisted that there is "an implied warranty on the part of the principal of the soundness of the machinery which he puts into the hands of his servants, so far as any unsoundness therein may be discovered by the exercise of proper care and diligence." This rule is undoubtedly correct as we have already seen, and as is shown by the authorities cited in support of it. But this is true only of the state and condition of the machinery at the time it is put into the hands of the servant. The principal does not warrant that the servants shall faithfully discharge their duty in keeping the machinery in its original safe condition. To

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establish this principle would be to abrogate the rule and make the principal the warrantor of the faithfulness of all the servants.

In view of these considerations we think the defendants were entitled to the direction asked for in their first request.

The judgment of the county court is reversed and the case remanded.

JONES & TIBBETS v. EDWIN HARD.

Sale. Intoxicating Liquor.

The facts in this case held to constitute a sale of goods from the owner to the bailee, having them in charge, and to render the latter liable to the former for their price in an action of book account.

The sale of liquors imported into this country in accordance with the laws of the United States, while remaining in the original packages in which they were imported, is not prohibited by the laws of this State regulating the sale of intoxicating liquor.

BOOK ACCOUNT.—The account presented by the plaintiffs was for a quantity of brandy, amounting to sixty-four dollars and fifty cents, and a quantity of gin amounting to forty-two dollars, together with interest from April 6th, 1853, and in regard to these items the auditor reported the following facts :

From 1851 until the time of trial, the plaintiffs resided and did business in the city of New York, as importers of and dealers in intoxicating liquors. The defendant, during the same period, was a resident of Westford in this State, and there followed the business of a tavern keeper, but had at no time a license, under the laws of this State, to sell intoxicating liquors. In October, 1852, previous to the sixth of the month, Tibbets, one of the plaintiffs, was in Vermont, and there it was arranged between him, self and the defendant, verbally, that the plaintiff should send from New York to the defendant, at Westford, a quantity of intoxicating liquors, viz : one cask of brandy and one of Holland gin, at

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Burlington, Vermont, and to be marked with a *diamond* H. This was not the ordinary mode of marking goods.

The purpose of the defendant was to sell this liquor in his business in violation of the statute then in force, (beyond what might be required for domestic consumption,) and this purpose was known to Tibbets, as also that the defendant had no license or authority to sell.

The direction as to the mode of marking the casks was given by the defendant, and for the purpose of concealing from others, during the transit of the goods, the person for whom, and the use for which, they were intended. This purpose was known to the plaintiffs, and the direction given was followed by them as hereinafter stated.

Tibbets returned to New York, and on the 6th of October, 1852, the plaintiffs forwarded from New York the goods mentioned in their account and directed the casks, by marks upon them, "H., Westfield, Vt." The name *Westfield* was written by mistake for *Westford*.

The goods, instead of being stopped at Burlington, were taken by the railroad company to their depot at St. Albans, where they remained until the night of the 29th of December, 1852, when the defendant took them, after paying the freight upon them, (three dollars and seventy-eight cents,) and removed them to his tavern in Westford and put them in his cellar.

In the mean time the defendant had made several journeys to Burlington and elsewhere to find these liquors, and had been thus put to an expense, including freight paid, of eight dollars and seventy-eight cents.

In the mean time also, the following correspondence passed between the parties by letter :

MESSRS. JONES & TIBBETS, Sirs :—Sometime since a gentleman that I supposed to be an agent of yours, agreed to send me two barrels of liquor to Burlington and send me a bill of the same, and wishing to know whether the critter was on the way I have sent this line. Respectfully yours,

EDWIN HARD.

WESTFORD, October 17th, 1852.

DEAR SIR :—Enclosed please find bill of goods, which were

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shipped to your address on the 6th October, which you write us have not been received. The delay may be occasioned by the goods being directed to Westfield instead of Westord, Vermont. You will also find duplicate receipt which we received for your goods, by which you will perceive they were sent to Westfield. Please write us if not yet received, and when received.

And oblige yours respectfully,

JONES & TIBBETS.

This letter was not received by the defendant until November 6th, 1852.

NEW YORK, November 18, 1852.

MR. EDWIN HARD, Sir:—Your favor of the 17th October was received, and we answered it immediately, and have not heard from you since, we therefore wish you would write and inform us if your goods have been received or not,

And oblige yours with respect,

JONES & TIBBETS.

WESTFORD, November 25th, 1852.

MESSEURS. JONES & TIBBETS, Sirs:—Not having learned or heard anything about liquor since your agent called on me some two or three months since, and having once called at wharf in Burlington to see if it had arrived, I had given up all expectation of your sending me any liquor, and have not at present any use for the article. Respectfully yours,

EDWIN HARD.

MR. E. HARD, Dear Sir:—Yours of the 25th has just come to hand. We are very sorry that you have not received the liquor we sent you October 6th. We also wrote you a short time ago that we made a mistake in the direction, which should have been Westford instead of Westfield.

We, therefore, wish you would go to Burlington yourself, and see if it is there, and if so take it to your house, and if you do not want it, keep it there until one of us visit your place, and we will pay you all the charges and make it satisfactory to you.

We do not wish to have it remain in the storehouse, as it may be carried off by some one else. Please write us about it on receipt of this, and you will very much oblige

Yours with much respect, JONES & TIBBETS.

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The liquor was marked

H., Westfield, Vermont, by way of Burlington.

MESSRS. JONES & TIBBETS, Sirs :—I found your two casks of pure Saratoga water at St. Albans depot last night about eleven o'clock. I put it into my cellar. I think it can remain there ; if the freemen of Vermont should confirm and adopt the liquor bill of the last legislature of our State, referred to the people for their approval or disapproval, I should think you had best to claim it as your property if I should think best to use the same. Respectfully yours,

EDWIN HARD.

WESTFORD, December 30, 1852.

No other communication took place between the parties until the 5th of May, 1853, when Tibbets again went to Westford, and there he and the defendants examined the two casks of liquor. Both casks had been tapped, and they ascertained, by measurement, that a portion of the liquor of each kind had been used. The amount taken from the casks was eight quarts of brandy and five quarts of gin, which had been sold by the defendant.

The expenses of the defendant in procuring the liquors was reckoned and agreed to by the parties, at in all eight dollars and seventy-eight cents ; and the amount of liquor sold at four dollars and twenty-five cents ; leaving a balance to the defendant of four dollars and fifty-three cents.

The casks were then bunged up, and the liquors left as the property of the plaintiffs, subject to the future orders and disposition of the plaintiffs, and the balance due the defendant was to be adjusted when the liquors should be disposed of by the plaintiffs or returned to them.

To this both parties assented.

After this the following letters passed between the parties :

NEW YORK, June 27, 1853.

EDWIN HARD, Esq., Dear Sir :—When our Mr. Tibbets was at your house the last part of May, he left with the intention of returning, but as it rained quite hard and he was in a great hurry, he did not return after seeing the town agent, to whom he thought that we could sell the liquors we sent you, but he did not

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succeed, therefore we think best to have them brought back to this place, and we wish you would have the goodness to ship them per Merchant's Lake Boat Line from Burlington to this place. And you can send your bill by them, or they will pay the charges and we can pay them, just as you prefer.

Yours very truly,

JONES & TIBBETS.

No. 166 Front Street.

N. B.—We should be glad to sell you the liquors if you think you can dispose of them. Please write us when you ship them, so we shall know when to look after them. J. & T.

WESTFORD, June 30th, 1853.

MESSRS. JONES & TIBBETS, Dear Sir:—When Mr. Tibbets was at my place the fore part of May and I accounted with him for some liquors that you wished me to hunt up and take care of, with an understanding that the sale to me should remain a secret with the parties, I did not expect you would be calling on me to ship the same to your place; but then I suppose you New York liquor gentlemen are inclined to have things about in your own way. I may as well close by subscribing myself

Your most obedient and very humble servant,

EDWIN HARD.

N. B.—The above is in answer to yours of the 27th inst. June.

NEW YORK, July 30th, 1853.

MR. EDWIN HARD, Dear Sir:—Yours of June 30th came duly at hand, and we have been looking for the liquor ever since, but have not heard from it. You did not state you had sent it, but as you said nothing about it we supposed that you had followed our instructions in regard to it.

Therefore, if you have not done it, we wish you would at once, and write us per mail the name of the line and boat, unless you want to keep it and pay for it as per bill.

Yours very truly,

JONES & TIBBETS.

After the 5th of May, 1853, without further correspondence or arrangement between the parties, the defendant sold said liquors in his business by the glass, at the rate of sixty-four glasses

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to the gallon and at the price of six and one-quarter cents per glass, and received his pay therefor, which amounted in the aggregate to more than the price charged for the liquor by the plaintiffs.

On the 8th day of February, 1856, the plaintiffs again called on the defendant, at Westford, and demanded of the defendant said liquors, and tendered him fifteen dollars for his charges upon them. The defendant claimed that if he had ever had any liquors of the plaintiffs he had paid for them, but he admitted nothing. The tender was not accepted. The liquors had been already used up.

The brandy charged in the bill was of foreign production, and was imported by the plaintiffs from Rochelle, in France, under the laws of the United States and in accordance therewith, and was in the original package as imported in a quantity not less than the laws of the United States prescribe.

The gin charged was imported liquor, but was not in the original package as imported, but in a quantity less than the laws of the United States prescribe for importation.

Upon these facts the county court, at the September Term, 1859,—BENNETT, J., presiding,—rendered judgment for the plaintiffs for the whole amount of their account including interest after six months subsequent to October 6th, 1852, to which judgment the defendant excepted.

J. French and E. R. Hard, for the defendant.

Geo. F. Edmunds, for the plaintiffs.

BARRETT, J. The original negotiation for the purchase of the liquor charged in the plaintiffs' account failed of becoming perfected into a sale by reason of the failure of the plaintiffs to forward it in compliance with their agreement. It had been forwarded to the defendant's address by the mark agreed upon, but was directed to a wrong town. For this reason it failed of going seasonably into his hands. When it became known by the plaintiffs that the defendant had not received the liquor, and that he declined to receive it because it had not come to him within the time agreed, they requested him to seek for and find it, and

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take it home, and, if he did not want it, to keep it till one of the plaintiffs should visit his place, when they would pay him all charges and make it satisfactory. In pursuance of this request, the defendant found the liquor and took it home and put it into his cellar, and informed the plaintiffs that he had so done by letter dated December 30, 1852, adding "if the freemen of Vermont should adopt and confirm the liquor bill of the last legislature of our State, referred to the people for their approval or disapproval, I should think you had best to claim it as your property, if I should think best to use the same." Thereupon the liquor remained till the 5th of May, 1853, when one of the plaintiffs went to the defendant and arranged for a settlement of the defendant's charges, by offsetting the value of some of the liquors from the casks that the defendant had in the mean time drew out and sold. The residue was left with the defendant as the property, and subject to the future orders of the plaintiffs. The balance due to the defendant was to be adjusted when the liquor thus left with him should be disposed of by the plaintiffs, or returned to them.

On the 27th of June, 1853, the plaintiffs wrote to the defendant concerning said liquor, and in a *postscript* said, "We should be glad to sell you the liquors if you think you can dispose of them." To this the defendant replied by letter dated June 30th, 1853, in which he professes to understand that the liquor had been sold to him by virtue of what had theretofore transpired, and expresses surprise that they should be calling on him to ship the same to their place, and closes the letter in an obscurity of expression quite wide from frankness, even if it can be regarded as consistent with honesty. The plaintiffs answered this letter, saying that they had been looking for the liquor, but it had not come, and requesting that if he had not sent it, he would do so at once, "and write by mail the name of the line and boat, unless he wanted to keep it and pay for it as per bill."

To this letter of the plaintiffs the defendant made no reply. It appears in the case that the defendant had sold out all the liquor prior to said 30th day of June, and taken pay for it.

The foregoing letters show that the idea of a purchase of the liquor was in consideration by both parties; the plaintiffs prof-

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fering the sale if the defendant should choose to buy ; the defendant by his letter of June 30th, professing to understand that the liquor had been sold to him. In addition to which is the fact that between the 5th of May and 30th of June, the defendant had treated the property as his own, having sold it out by the glass and received therefor something more than the price which the plaintiffs have charged him for it.

We think these facts must be regarded as constituting a purchase of the liquor by the defendant of the plaintiffs "as per bill," that had been furnished about the time the liquor was forwarded from New York. The defendants assuming to use the liquor as his own, in accordance with the plaintiffs' proffer to sell it to him, should entitle the plaintiffs to treat and hold him as a purchaser. His conduct was entirely inconsistent with the idea that he regarded himself as a mere bailee for the safe custody and return of the property to the plaintiffs, and is only consistent with the fact of his regarding himself as a purchaser in pursuance of the proffers of the plaintiffs, unless we are to presume that he designed to embezzle and cheat the plaintiffs out of their property, which, perhaps, might not be regarded as a very violent presumption in the present case. It is to be noticed that the defendant has never denied his having purchased the liquor. In his last letter to the plaintiffs he professes to have understood that he had bought it. In the interview in February, 1856, between the parties, the defendant claimed that if he had ever had any liquor of the plaintiffs he had paid for it, but as the auditor adds, "he admitted nothing." Conformably to this claim, if the defendant did have the liquor of the plaintiffs, it was upon a purchase, as is conclusively implied by the alleged fact of having paid for it.

In the position thus assumed by the defendant the plaintiffs proved that the defendant did have the liquor. This left the parties standing upon the question, first, had the defendant paid for it? The auditor has found that he had not, but that the defendant had a charge of eight dollars and seventy-eight cents for services and freight paid, which the plaintiffs were willing should be applied towards payment for the liquor. Second, is the defendant liable to pay for it?

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The liquor had been sent into the State for the purpose of being sold. It came into the hands of the defendant as bailee, with the right to keep it as a purchaser, or to return it to the plaintiffs upon their order. The defendant chose to keep it as upon a purchase. The sale and delivery must be regarded as having taken place in Vermont. The terms were proposed by letters addressed to, and received by, the defendant in this State. His acceptance of the proposition to purchase was by acts done in this State, as well as the delivery and acceptance of the liquor itself, by which the sale and passing of the title were consummated.

Such sale was made contrary to the terms of the statute of this State, and with knowledge, on the part of the plaintiffs, that the purchaser designed to use it in violation of the law. Hence, within the principle of many decided cases, as also by the express provision of the statute of 1852, prohibiting the sale of intoxicating liquors, the plaintiffs are not entitled to recover pay for said liquor unless the transaction is saved by the statutory exemption or otherwise. To this end the plaintiffs invoke the principle established in the case of *Brown v. State of Maryland*, 12 Wheat. 409, which has been reasserted and applied by the United States supreme court, in the case of *Thurlow v. Massachusetts*, *Fletcher v. Rhode Island*, *Pierce et al. v. New Hampshire*, 5 Howard 504. The auditor finds that the plaintiffs imported both the gin and the brandy; that the gin was not sent forward in its *original package*, but that the brandy was, and came into the defendant's hands in that condition, and that it was imported conformably to the laws of the United States.

Our statute of 1852, section 12, expressly recognizes the efficacy of the laws of congress under the constitution, to exempt liquor in the condition of the brandy, when it came into the defendant's hands, from liability to seizure and confiscation. We think it is fairly to be implied that the legislature designed to leave such exemption to be operative to every legitimate intent, and thus to permit liquors in that condition to be the subject of lawful sale by the lawful owners thereof. Regarding this view to be well grounded, we prefer to avail ourselves of it in disposing of this case, rather than to enter upon the question of the constitution-

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ality of our statute, so far as its prohibitory and penal provisions might be claimed to apply to the sale of *all* intoxicating liquors. The cases above cited would seem to be conclusive upon this subject if it were necessary now to pass upon it.

In our opinion the gin, in the condition in which it came into the defendant's hands, was not within the exemption, and therefore, by reason of the purpose for which it was sent into the State, was *contraband*, and the sale of it to the defendant was a violation of our statute. The cases cited from 5 Howard so decided. On the other hand we regard the brandy, in the condition in which it came into the State and went into the hands of the defendant, to have been the subject of legitimate sale, with which our statute was not intended to interfere.

Hence, in our opinion, the plaintiffs are entitled to recover for the brandy the price found by the auditor. While the view thus taken seems to be sound, it is the only one on which the plaintiffs' right of recovery can be maintained. If it were to be held that the defendant was mere *bailee*, and as such wrongfully converted the liquor, then the plaintiffs' right to recover would rest on the ground of waiving the *tort*, and treating the defendant as their agent in selling out the liquor with full authority thus to do. If this fiction should be adopted, it would be difficult to avoid the consequences flowing from the illegality of such sales as the defendant made of the liquor. If the plaintiffs were thus to subject themselves to the charge of having sold the liquor in violation of the statute, they would fall under the provisions of the 21st section, and thereby be precluded from recovering the price of the liquor thus wrongfully sold by the defendant. This principle is familiar, and its application to this case would not be doubtful. See *Backman v. Wright*, 27 Vt. 187. It will be kept in mind that the sale of liquor within this State can be protected only while it is passing in the original package of importation, in such quantity as is prescribed by the laws of congress regulating its importation. Conformably to the views thus presented, the plaintiffs are entitled to recover for the brandy, deducting the four dollars and fifty-three cents, and adding interest to September 30, 1859, the sum of eighty-two dollars and fifteen cents. We are disposed to regard the rest of the defendant's charge as

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fairly satisfied out of the money he got for the gin that he refuses to pay for.

The judgment of the county court is therefore reversed, and judgment is to be entered in this court for said eighty-two dollars and fifteen cents, with interest to be computed from the 30th of September, 1859.

THE STATE OF VERMONT v. PETER McDONNELL.

The right of the jury in criminal cases to be judges of the law as well as facts, and the duty of the court in respect to their instructions to the jury as to this right. Confessions. Evidence. Murder. Manslaughter. Criminal law.

It is not error, in a criminal cause, when the benefit of the rule is claimed that the jury are the judges of the law as well as the facts, for the court to charge the jury, in their own way, that this rule is not intended for ordinary criminal cases; that it is matter of favor to the respondents, and should not be acted upon by the jury, except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court must be taken solely upon their own responsibility, and that the safer and better way, in ordinary criminal cases, is to take the law from the court, and that the jury are always justified in doing so.

In important criminal trials, when the prosecution resorts to the confessions of the respondent as evidence against him, great care should be exercised by the court, lest, either in the mode of obtaining the confession, or the use made of it, injustice be done to the accused. His whole statement, embodying the confession, should be taken together, and all parts of it, both the exculpatory and the inculpatory portions, should be treated alike, except such as are disproved by the other evidence, or their own innate improbability or inconsistency.

When testimony is admitted upon the representations of counsel that it will be connected with additional evidence so as to render it material, and this representation fails to be fulfilled, the court, in their charge to the jury, should expressly direct them to exclude such testimony entirely from consideration.

The practice of courts of reading to the jury, in their charges to them, abstract legal principles from text books and reports, criticised.

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In trials for murder it is the duty of the courts, first, to regard the accused as innocent until he is proved guilty; and, secondly, after he is shown to have committed a homicide, to look for every excuse, which may reduce the guilt to the lowest point, consistent with the facts proved. REDFIELD, Ch. J.

If in a mutual combat arising without previous malice, mutual blows be given before the respondent draws his knife, and he then draws it in the heat and fury of the fight and deals a mortal wound, with the purpose of taking life, the offence is only manslaughter.

But if the design to kill be formed deliberately for ever so short a time before the infliction of the mortal wound, or if it be formed without such provocation as the law regards as sufficient justification for heat of blood and anger, the offence is murder.

If one inflict a mortal wound, with a deadly weapon, upon a vital part, it is a presumption of fact that he designed the natural consequences of his act; and it is murder, unless he shows that the result was not designed, or that the act was done in heat of blood upon legal provocation, or under justifying circumstances.

The charge of the court to the jury in this case held erroneous, (and a new trial granted therefor) because, there being testimony tending to prove a case of manslaughter only, the court neglected to call the jury's attention to it in that light, or to the theory of the respondent's counsel upon the evidence, indicating that it was manslaughter and not murder, and omitted to inform the jury of the distinction between murder and manslaughter, except in a few abstract remarks, unaccompanied by any application of them to the facts in the case.

INDICTMENT against Peter McDonnell, John Bain, and John Kelly, for the murder of John T. McKeen. Plea, not guilty, and trial by jury, at the September Term, 1859,—BENNETT, J., presiding. The jury rendered a verdict of guilty as to McDonnell, and not guilty as to Bain and Kelly.

The court having allowed the respondent to except generally to the whole charge of the court, without requiring him to specify at the time any particular exceptions, it is material to detail the whole testimony given on trial, and the whole charge of the court, so far as the respondent McDonnell is in any way concerned. The witnesses testified in substance as follows:

Henry M. Wight, a witness for the State, testified: I reside in Burlington and have for two years past. I was acquainted with John T. McKeen, and was connected with him in business from May, 1858, to within four weeks of his death, in the har-

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ness business, on the west side of Church street, in the building occupied by Ferre's shoe store, right opposite Fath's saloon, which was back of Prouty's shoe store, with an avenue between Staniford's and Prouty's leading to the saloon. The sidewalk in front of Ferre's shoe store from the door step to the outside of the walk is ten feet and eight inches, and the step is seventeen inches wide. There is one step between the threshold and the sidewalk. The breadth of the front of the store is eleven feet and nine inches, and extends from Warner's on the south to Brinsmaid's on the north. The door is near the north side of the front, the balance is a window, and there is a glass over the door.

I was in the store on the night of May 21, 1859, after half-past six o'clock. It was my place of business. The door was closed about nine o'clock, and I think was locked. The window shutters were also closed.

There was no blind over the window over the door. This window consisted of three panes of glass, say a foot high, and extended the width of the door. When the store was closed Mr. Ferre, Leonard Bliss, Logan, McKeen, Mr. H. E. Howard and myself were there. McKeen's family were at that time in Hinsdale, N. H., and he slept in Brinsmaid's building, which was adjoining the store.

McKeen was about one hundred and fifty pounds weight, and about thirty-five years old.

I did not leave the store until the death of McKeen; Ferre left upon closing the store; Howard left at about ten o'clock, and the others remained until the death of McKeen. George Hagar came in at about the time the store was closing and left. No other person came in.

We were playing whist in the back part of the store, Logan, McKeen, Bliss and myself, about thirty-eight feet from the door. We had one fluid lamp only, which stood where we were playing.

I was boarding at Bliss', and Logan also, on Bank street. About twelve o'clock some one came to the store door and made some noise on the door, shook it a little and said something through the key-hole which I could not understand. I think he put his hand on the door, but only once.

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I had heard no noise in the street before, and there had been none in the store.

McKeen got up immediately and went to the door. He was sitting with his hat and coat off; he did not put them on when he went to the door.

Logan went next after, then I followed. McKeen got up to the door first, but I think not more than two feet before Logan.

I went before Bliss. I had got one-third of the way to the door when McKeen got there. Bliss got to the door very soon after me. I can't say how long. Bliss had not started from the table when I left; he got to the door a few seconds after me. I went directly to the door. McKeen opened the door and stepped on to the step and stood there to the right of the center of the door on the south. Logan passed out on to the step and stood on the right or south side of McKeen, about two feet from him.

I stepped on to the step on the north side of McKeen; Bliss stood in the doorway. I heard no conversation from McKeen before I got to the door.

When I got to the door I saw three persons walking down the street from the north, on the sidewalk, on the same side with the store. These persons were about ten feet to the north when I first saw them. Two of them were rather short and one considerable tall; they were walking slow. I heard no conversation between them while they were approaching; they were nearly abreast.

The tallest one was inside the walk and next to the shop; one of them stopped nearly in front of the shop. The others didn't stop until they got a little below where McKeen was standing. One of the short ones stopped first. It was about two or three feet below that the others stopped. I did not know the persons.

They were walking down when I saw them first. When the conversation commenced, McKeen asked them what they were around there for. They made no reply. He then asked them which it was that came to the door; this was said after they had stopped. The one who was standing nearly opposite replied "suppose it was me, what are you going to do about it?" He was then standing about six feet from McKeen, and facing him. McKeen asked him what he did that for? He replied "I don't

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know as it is any of your business, you damned son of a bitch."

McKeen asked him what was that he called him, or what he called him that for, (can't say which.) There was no reply made to this. Immediately upon this McKeen stepped down on to the walk from the step about two steps. This short man advanced at the same time that McKeen stepped off the step, and they met about half way from where each was standing. They came together and had some sort of a clinch, (could not see how they had hold of each other,) and immediately began swaying toward the door, and both fell partly behind me and partly on the step. I heard the fall, but did not see them fall. I had stepped on the walk about two feet from where I first stood. My attention was drawn to the other two, standing a little below. As they were falling, my attention was drawn to them by an exclamation of McKeen. McKeen when I first saw him after the exclamation, was, on his back, with his feet on the walk and his shoulders on the steps, his feet standing a little to the south. McDonnell was bent over him, with his hands resting on McKeen's shoulders, and his feet or knees resting on the walk. I can't tell where McKeen's hands were.

While McKeen was falling McKeen said, "Take the bugger off, he is knifing me." I was at this moment looking at the others. This is the last he ever said.

The others stood, the short one about twelve feet below and south from me, on the outside of the walk. The tall one was near the building, south of me, about ten feet from where I was standing, and the two were five or six feet apart.

When I heard the cry I turned around and took the man off of McKeen. As I was doing it, the tall one stepped up towards me within reach, made no stop, but immediately turned and ran.

The other two started and ran down the street; I think the man I took off started first a very few seconds. They went south. I did not pursue them. The man made no resistance to coming off. He did not seem to have hold of McKeen in any way.

When they fled McKeen was lying on the steps. I raised McKeen up and carried him into the shop and laid him on the floor. He gave no assistance. It was not over two or three

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minutes after they fled before all signs of life ceased. He was afterwards (in three or four minutes) placed on the counter.

McKeen stepped from the step quick, and the short man advanced with quick step. McKeen faced me as he was advancing. His hands were raised as I stood behind him. I am not certain that I could see his hands, but think I could. I think his hands were raised about as high as his elbows; the witness here illustrated the position of McKeen's arms and hands, showing the elbows in a natural position. As they were approaching I could not see the position of the other's hands. I did not see the hands of the short man before they fell. I saw no effort on the part of McKeen to strike.

The time between McKeen's leaving the step and the fall was less than one minute. I can't state the exact time. It was done very quick. It was quite dark. There was no light but the fluid lamp which stood in the back part of the store. The door was open. I was at the same shop in the early part of the evening the Saturday before.

I saw no blows struck after the parties fell to the sidewalk. After the exclamation of McKeen my attention was directed partly to the two south of me and partly to McKeen. It was less than half a minute after the exclamation before I took him off.

I can't say how near down they were when I heard the exclamation, for they were behind me.

Cross Examination.—I immediately turned around when I heard this exclamation, and saw McKeen on his back and the man over him. I turned around as quick as I could. They were down then. I heard the fall immediately after the exclamation. I heard them fall before I turned around. There was hardly any time between the exclamation and the fall. There is a counter on the south side for from half to two-thirds the length of the store. We were playing upon a box set on end. I sat with my back to the door. Logan sat opposite me, McKeen on my right, and Bliss on the left of me. The light was set on the box. The box was about in the center of the store crosswise. I don't think the door was shaken very hard. I am sure the door was shaken. I think I heard but one remark at the door before we went out, but could not understand it. It was loud enough to be heard

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distinctly. McKeen got up immediately, but no remark was made by any of us on the inside; he walked pretty quick, but not very rapid; he made no remark on the way to the door. Logan started next. I think he said nothing, but started and walked quick. I started next, and then Bliss.

I was a witness before the coroner's jury, I stated then that I started *next* after McKeen. I was mistaken, don't know how I made the mistake. Knew very well it was Logan who went next.

Was twice called on there. I can't tell what made me make that mistake. I was twenty or twenty-five feet behind McKeen when he got to the door.

I think McKeen first said "what are you doing out there?" He didn't make that remark until I reached the door. I didn't state before the coroner that McKeen said this as soon as he stepped on to the step. I can't say whether I stood in the doorway or on the step when I heard this, I didn't say there was no reply.

McKeen then said, "which one of you came to the door?" not "which one of you hollared through the keyhole." Next was that one of them said "suppose it was me," etc. Then McKeen asked him what he did that for?

Before the coroner's jury, I think I did say McDonnell said something like "son of a bitch," or some such expression; I can't now say what expression was used. Did not use it in connection with the saying that it was none of his business. Was in connection with the expression that it was none of his business. In answer to McKeen's question, what he (McD.) did that for? McDonnell said "none of your business, you damned son of a bitch."

I have since read the printed report of the testimony. When McKeen was stepping down the step, McKeen said, "what is that you call me?" The short man stood six feet from the step, and McKeen stepped two steps. I couldn't see how they came together, as it was very dark, and McKeen's back was towards me. They had some kind of a clinch. I saw them meet, but couldn't tell how their hands were. I saw their bodies come together. I don't recollect any remark from Logan. He stood about five feet from me. I was probably a little excited.

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I did not turn around immediately after their bodies came together. Their bodies were together as they swayed towards the steps. It was about half a minute after they came together before I turned around. When I turned around I was nearly facing the door, a little to the south.

I can't say whether I stated before the coroner's jury, that it was about two minutes after McKeen left the step before he fell.

I think now it was not two minutes, but less than a minute. Might have said before that it was less than two minutes. I can't say.

I think I did state before the coroner that I heard the exclamation before he fell. Don't know as I did state that I heard the fall after the exclamation. It was about the same time. McKeen spoke very quick, as if in pain, or scared. It was a sudden exclamation. I never knew of any controversy between McKeen and the respondents. I only knew Kelly. I don't know as McKeen knew either of them.

Leonard C. Bliss, for the State.

I was acquainted with John T. McKeen for a year or a year and a half before his death. I do not know the respondents. I went to McKeen's shop about nine o'clock, P. M., of May 21, 1859, at the time they were closing up, and remained there until after the death of McKeen. Soon after Ferre went away, young Mr. Hagar and Alger came in, and went away soon. McKeen, Logan, Wight and myself were playing whist.

Some one came to the door between eleven and twelve o'clock and rattled; made some noise on the door and spoke through the keyhole. I could not understand what was said. I heard a voice. Soon after this noise McKeen got up, and Logan and Wight and I started about the time McKeen opened the door. They went to the door in the order stated by Wight in his testimony. I heard them speak before I got to the door. McKeen wanted to know what they were about there for. I heard no reply. When I got to the door there were three persons a little above (north) of the door, on the west sidewalk, coming down; they could not have been more than ten feet off. They came opposite to the door, and McKeen spoke and wanted to know which of them was pounding on the door and speaking through

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the key-hole. One of the party stopped (a shortish fellow) and the others passed by. This one who stopped said, "Suppose it was me, what are you going to do about it?" McKeen spoke again, and wanted to know why, or which one was pounding on the door or speaking through the key-hole. The answer was, "Call it me, you son of a bitch," or something like that. McKeen stepped down and wanted to know why he called him that. As McKeen stepped down this man approached, and there was a clinch. I saw no blows, and they fell. McKeen had no coat or hat on. This man was five or six feet from McKeen when he stepped down. McKeen proceeded one or two steps before they met. They came together pretty quick. I hardly know which stepped quickest but should rather think the man did. I did not see McKeen use his hands, until in falling, I saw him put his hands rather around McDonnell's shoulders, as if to save himself from falling. When they met they were two or three feet from the steps. I did not see the motion of the hands of the other man. McKeen was between me and the other man. I was standing on the door in the threshold.

They fell with their heads towards the door, where I was standing, and I think McKeen's left shoulder struck first on the step; he struck a little sideways, his feet a little down the street. I think the other man fell on his left shoulder, a little on the steps and rather over McKeen. I won't be certain that he struck the steps. I can't say that I saw McDonnell's hands. I can't say whether after McKeen had struck the steps or before (it was so quick) McKeen said "take the bugger off, he is knifing me." Mr. Wight then took hold of the man, and I went back into the back part of the store. I came back very quick and found Wight was lifting up McKeen, and I saw them running, and I and Logan followed them to Hagar's corner, and saw them running down towards the lake. I returned to the store.

When McDonnell and McKeen met, the largest one of the three we found on the outside, stood near the store, some six or eight feet from the door, and the other boy outside of the walk, ten or twelve feet from the door. When Wight went to take hold of McDonnell the largest one started up the street toward Wight. I think McKeen's hands were by his side when he left the steps.

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I heard no observation from either of the others. It think it could not have been half a minute from the time McKeen left the steps before he fell on the sidewalk.

When I returned to the store, after pursuing the three, McKeen lay on the floor of the store. McKeen was then alive, and I said "he is a dead man," and I ran for Dr. Thayer. The knife was found before I got back from the doctor's. I don't remember any other language from McKeen except what I have related.

I saw no blows struck by either party, nor heard any at any time. As McKeen was falling he clinched hold of McDonnell rather to save himself I thought. It was but a very few seconds after they met before they fell. I saw no use of the feet while they were up.

Cross Examination. I was a witness before the coroner's jury. I don't know whether I testified that *after* they fell I heard McKeen say "Take the bugger off," etc., either in direct or cross examination. I don't remember, I can't say now whether it was just before or after he struck the steps. I was looking right at them.

Before the coroner I think I did not testify that he had his hands raised. I can't remember how I did testify. I think I did not, in conversation with Chittenden the other day, describe his hands as raised. I think I have testified that they fell on their sides. I don't know whether I testified that they fell side by side, and McDonnell rather rolled over him. They fell sidewise and McDonnell was instantly over him, soon after they went down.

When McKeen got to the door I was about starting. I heard nothing said before McKeen started. Right in front of the door the light shone out so that I could see. The clinch was a little below the center of the door, but some part of it in front of the door. I heard their feet, but no great noise.

I think I did testify that McKeen asked "What are you rattling on my door for," at some time, but I can't say this was the first remark.

I don't remember the remark of "*sail in.*" Can't say that I testified that they came down on their sides. McDonnell was standing five or six feet from the step, about midway of the side-

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walk. I went to the store about nine o'clock, and began to play about ten o'clock. Coburn was in there and left about eleven o'clock.

Wm. H. Logan, for the State.

I knew McKeen for nine years. I do not know the respondents. I was occupied in the store. I was in the store on the night McKeen was killed.

About twelve o'clock some one came to the door and made some noise, like taking hold of the latch, and spoke and said something. McKeen got up quite soon and went to the door and opened it, and I followed, and the rest. I was directly behind McKeen, the rest followed in a few seconds, a couple perhaps. McKeen stepped on the step and I stepped to the south side of him on the step.

When I got out I saw three persons north of me. I did not know them. Some words passed between the parties. McKeen inquired who was there, or what they were doing? They were then up the street and seemed to be standing still. They made no reply. They commenced walking back, and proceeded opposite to us. McKeen inquired again who it was that came to the door. The tall one said "Say it was either of us," or something of that kind. One of the others said "Suppose it was me for instance," and inquired "what he was going to do about it, you damned son of a bitch." This was McDonnell. He was standing near the middle of the sidewalk, opposite McKeen, a little outside of the middle of the sidewalk.

McKeen inquired what he called him, and McKeen stepped forward and the other stepped forward towards him at the same time. They clinched, or appeared to clinch, and fell shortly after.

McKeen went half way between the two; they stood six feet apart. I can't describe the position of McKeen. I think McKeen was not bent.

They fell in a minute, perhaps half a minute. McKeen fell with his head towards the steps and lay on his back. After they fell the other was bent over him and pretty close to him. I don't know where their hands were as they approached.

I can't say how McKeen's hands were when he started to meet McDonnell, nor how McDonnell's hands were. I saw the right

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hand and arm of McKeen, and left hand and arm of McDonnell, and around their bodies. McKeen's back and side were partly towards me.

As he was falling he exclaimed "he is knifing me, take him off." It was within a minute certainly, perhaps less, perhaps half a minute after they started together before they fell. After this exclamation of McKeen, the tall one stepped towards McKeen and then they all left. I can't say how near he came, perhaps two feet. I followed them for say half a minute, and then came back, and McKeen was then inside.

I saw no blows struck by either of the parties. After McKeen fell I think his hands lay beside him.

The Saturday night previous I was in the store playing whist, Howard, Coburn and McKeen were there. Some one came to the door a number of times. There was more than one person. They first came about ten o'clock, and hallooed at us and called us some names.

They wanted to know what we were doing there, and what was trumps, etc. They stumped us out to fight, and said if we would come out they would lick us, or something of that kind. This lasted three or four minutes. Was silent a while and they came again. The second time they spoke again and called us something, and wanted to know what that little white headed fellow was doing, and would tell Brinsmaid of him. I think they came again, I am not sure.

The second time they came and stumped us, McKeen went out, and I behind him; I did not see or hear any one, and went back.

After we went out they came again. They said (I think) if we would come out they would lick us, or something like that. McKeen said they would run again. They said they shouldn't.

I believe at one time they called Mr. Wight's name. There were other replies made within, but I can't state what they were.

These visits were fifteen or twenty minutes apart. McKeen boarded at Stanton's, i. e., took meals, but lodged up stairs in Brinsmaid's building.

I saw Wight on the steps shortly after he came to the door. Wight was on the step when McKeen made the first remark.

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They were then about twenty feet north of us. They were standing then.

They came down about opposite and one stopped there, and the others passed a little. I stood on the south side of McKeen, and Wight on the north side.

I heard McDonnell make some such remark as "well, sail in then." This was in reply to something McKeen said, but what it was I don't recollect. This was before McKeen stepped off the step, a few moments before, may be half a minute.

I don't recollect as McKeen said anything in reply to that. I think McKeen did say after this, what was this he called him, and immediately stepped down the steps, and I think they were clinched and had hands around body.

I don't think I turned around. My eyes were off them for a short time. I was looking at the others, and Bain was stepping up. I told him to step back and see fair play. He did stop. I don't know what McKeen and McDonnell were doing, but they appeared to be clinched. Bain made no reply to this. I then looked around as McKeen spoke and made the exclamation, at that time or about that time. I did not see them doing anything after I turned around.

I was examined before the coroner's jury, but don't think I said he made the exclamation after they fell. May be while he began to fall a part of it and part after. I don't think it was after he fell. I don't know as I testified that McKeen started first. Think they started about the same time.

I don't think I can state which started first. It was not a very quick expression and didn't make me think that he was very much injured.

I was twice examined before the coroner's jury. I don't know as I testified that Bain made any remark then; I don't remember that I did. I meant to state all I remembered. I don't know now as I then remembered it. I have talked with Bliss and Wight about the circumstances. I have spoken with Hard about it, but can't state what. The last time was the day before yesterday in the store. Wight was behind us.

I think I did testify that near the time I saw them falling I turned to Bain.

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I can't say that it was the precise time that I saw them falling that I turned to Bain and told him to stand back, etc. Don't think I saw McDonnell and McKeen after I had made this remark until after they had fallen.

I don't remember where I was looking when I heard the remark "he is knifing me." I don't remember whether the exclamation was before or after I made the remark to Bain; they were made about the same time. I did not hear them fall.

I guess I saw them falling. I don't remember as I was looking at them the moment of their falling. I don't remember how the parties were located at the play the Saturday week before.

I can't say how often we were accustomed to play there. I don't remember as we played any that week except as stated. I don't remember of persons coming to the door at other times. Last night the key-hole was stopped.

One could raise himself up and look over the door. I heard no one attempting this.

I don't know as the other short man said or did anything.

Dr. Samuel W. Thayer, Jr., for the State.

I am a physician and surgeon. I made a post mortem examination of McKeen at the shop of Mr. Ferre. There was an incised wound in front of the thorax or chest, and a slight bruise on the left shoulder. These were all the marks I saw. The wound was in the breast bone, at a point between the 4th and 5th ribs, a little to the right of the median line entering the cavity on or slightly to the left of the median line. The direction being from below upwards, and from the right to the left. It extended into the cavity about three inches from the skin and reached the upper side of the heart.

(Here the witness inserted the knife in the breast bone of the deceased, which was produced, and the position of the knife shown.) The edge of the knife was to the left. The knife was found upon the floor near the body of McKeen. This bone is quite firm and strong, about a quarter of an inch in thickness or a little exceeds that.

This is the last bone in the system that becomes solid, but solidity takes place at maturity usually. This is quite a firm bone. It requires considerable force, a good deal of force, to make this

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wound. I don't think that the wound could be made while standing and in contact by a direct blow given in the ordinary way.

Question by State's Attorney. How must this blow have been given if the parties were standing?

Answer. Supposing that the parties were standing, it was given back hand from left to right, at a sufficient distance from each other to allow full play to the arm, or the knife was held in the natural position and the parties rushing upon each other; i. e., if the instrument passed its length at one stroke, it might have passed part way with a slighter blow.

This is a part of the heart, in this bottle, that was perforated.

As I was examining McKeen a young man stooped and picked up the knife on the floor, between the angle of the counter and the door. Moist blood was on the knife.

Cross Examination. Death would almost instantly ensue, the person might possibly utter a word or two, might respire once perhaps. I would not say a perfect respiration. The person would be no more likely to feel this wound at the time than a bruise.

I think this wound would be felt, at the time, immediately. There was an important nerve wounded, the internal respiratory called the phrenic nerve, a nerve of motion, this would be severed. This would render the muscles of the chest paralyzed. It would impair respiration, but not entirely prevent it.

The immediate sensation would be that of suffocation; after such a wound a person could not struggle much. I should expect immediately an exclamation of pain, (after such a wound) faintness and death. From the character of the knife, the direction and extent of the wound, my inference would be that the instrument went through the skin and fastened itself into the bone while the parties were standing either erect or bending, and that it went through and to its destination when they fell. If the person were falling on his left shoulder it would bring the heart nearer the sternum than in any other position.

There is no certain indication that the skin was penetrated while they were standing. It would seem to be so from the direction of the wound.

If the party was down and the accused stood over him it would

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give it this direction. There is nothing in the wound inconsistent with the idea that the knife penetrated the skin while the parties were in contact and while the victim was bent forward.

This is a very clean cut. I should think that there was not much struggle after the wound was received. I should think there was not any, if the parties were clasping each other, instantaneous relaxation would follow. The knife would be held somewhat firmly in the wound.

I think the probabilities are that the extreme penetration occurred when the person lay on his left shoulder upon the ground. The knife might have pierced the skin when the parties were in contact and the person *stooping*.

Dr. Edward Bradley, for the State.

I am a surgeon, and aided in the post mortem examination of McKeen. I took from the body these parts, the sternum and a portion of the heart.

This bone is a very firm one and is fully ossified, and it would require a good deal of force to go through it.

Horace E. Howard, for the State.

I live with J. E. Brinsmaid, the jeweler, next door north of McKeen's. I was quite well acquainted with McKeen. I am somewhat acquainted with Bain and McDonnell. I had heard them speak often before this, in meeting them. I have seen them often.

I was in the shop on Saturday night, the 14th of May. I went in a little after nine o'clock and remained there until between ten and eleven o'clock. We were playing whist in the fore part of the evening, Logan, Wight, McKeen and myself; Coburn was also there.

All of us four were engaged in whist. Between half-past nine and ten o'clock some one came to the door and put his mouth to the key-hole and said "What the devil is trumps," or "What are you doing there," or something to that effect.

I think there was no answer made. They stepped up again and appeared to be looking through the key-hole and said "Go home, old tinker, or I'll tell Brinsmaid.

They stayed, and we could hear them talk, and I thought there were three or four there.

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Again some one took hold of the door and shook it. They shook it pretty hard, and McKeen said if they wished anything to come in, if not to go away and let the door alone. One said, in effect, "By God I shan't go away, and if you think you can help it come out and try it." These might not be the words. I can't say whether there was a reply or not. Then they said "you dursent come out." Then they went away.

In fifteen or twenty minutes they returned and came on to the steps, and shook the door and stamped on the steps. I think then they asked if we had got ready to come out of the store. I think McKeen spoke and said they had better go away and stop their noise. Some one said to this "Come out and by God we'll fix you." The second or third time they came (I think the second time) McKeen went to the door. Then they went away.

I think the second time they were there McKeen said "I'll go to the door and see what they want," and Logan started at the same time. McKeen went to the door and they ran; I saw one good sized person and one smaller person pass the door, and afterwards heard three or four persons running into the alley way. I think McKeen said at the door "What'll you have." I heard no reply, but they ran. In five or ten minutes after this they came again (for the third time) and stamped on the steps and made a noise, (I think on the door) and said "Damn you, you dursent come out, and if you come out now we won't run again." They said they would knock him or any of them that would come, they would'nt run for any of them.

They dared us out a good many times. I think they were there four or five times. They would stay fifteen or twenty minutes each time, threatening and using profane language.

We went to bed a short time after this. I heard two or three voices, two certainly. I saw a man running; he was about the size of Bain. I was certain that the first one who spoke was Bain. I could'nt say as to the other. I think I heard Bain's voice at nearly every visit.

I think just at dark I saw Bain and McDonnell together on Lyman's corner, but would not be positive. I think I saw them but once that evening.

Cross Examination. McKeen had occupied the building about

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a year. He worked up stairs, and down stairs during the winter. He had a bench down stairs; he had goods above and below. McKeen worked below and his partner above.

We began to play at about half past nine o'clock, and played perhaps an hour, but not until we went to bed. I think we were talking towards the last of the rattling, but am not positive. I can't be positive whether I went out after the store was shut up. I don't recollect of going across the street, or into Fath's. Don't know that any one went over there. McKeen slept with me most of the time, and slept with me that night. I went to bed at half past ten or eleven o'clock. I judge it was as late as that.

We were playing clear at the west end of the store. I did not go to the door. We had a small fluid lamp. It was middling dark, pretty dark; I think I could see the shadow of a man as he crossed the street so as to distinguish him.

There was a light in Fath's saloon.

I was sitting on the north side of the table in playing. When they spoke of the tinker, I think I said "Guess I wouldn't be in a hurry." I think McKeen smiled. McKeen went to the door either the second or third time they came. I can't say whether he bolted the door. Logan was there all the while.

I was in the store on the night of the homicide at about nine o'clock, and staid as late as ten o'clock or later and went to bed. There had been no disturbance at that time. I went to bed directly over Brinsmaid's store.

I was in quite often of evenings, occasionally playing there, but not regularly.

The step is twelve or fifteen feet in length; some nights in summer while the band is practicing, folks sit on these steps. The band practices right opposite. I think it was not a place of resort at this time. It was not very cold then and the band practiced there, but they did not practice as late as this. They sometimes play as late as ten o'clock. They might have begun to practice late in the spring, say June.

Henry Brown, for the State.

I know Bain and McDonnell. I lived in town at the time of McKeen's death. I passed Ferre's store Saturday night of the week before. I can't state the hour, it was pretty late. It

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might have been half past nine, ten, or eleven o'clock at night.

I saw Bain and McDonnell sitting on the steps between Warner's and Brinsmaid's. They spoke to me and I went to them. I spoke a few words with them. I spoke in a friendly manner, nothing particular said. One of them halloed something, and I said "I guess boys you had better stop, you may get into a fuss, you had better come now," and they did come away with me. I can't say which it was that made the noise. One of them was sitting and one standing. I think Bain stood beside me and the other was sitting. It was so dark I could hardly see my hand. I heard no more noise whatever. Only one of them made the noise and this was not loud or sufficient to make any disturbance. It was just before the door. His back was to the key-hole. He turned round and put his mouth pretty near the key-hole. I went home to bed. I could see no light. I have never spoken a dozen words with either of them, but know them by sight. The stores in the neighborhood were closed, but I saw lights in Fath's saloon and in the Band room. I invited them to go in and drink beer. They refused and I went home.

Cross Examination. I believe I shook hands with one of them, I know Edgell's son by sight. I don't think it was Edgell, I can't swear it was McDonnell.

Direct Examination. I can't say that I spoke with more than one of them. They stood about the distance from me to that partition, (which is, say, four feet.)

Harmon Ray, for the State.

I am acquainted with the prisoners. I saw McDonnell and Bain together on Saturday evening between half past eight and nine o'clock, May 14th, on College street, between the apothecary shop and Lyman's store. I had been to the post office and was returning; the post office was shut. I saw them only at that time.

The prosecution then offered one Mosher as a witness, and upon being called upon to state the matters to be proved by the witness, the State's attorney stated them as hereinafter detailed in the direct testimony of said Mosher, and stated further, that he expected by that testimony, and other testimony as to the resemblance between McKeen and Mosher, to satisfy the jury

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that the attack made upon Mosher (as hereinafter stated) was made by the respondents upon their supposition that Mosher was McKeen.

To the introduction of this testimony the respondents objected, but the court admitted the same, and Mosher testified as follows:

Mosher's testimony.

I knew McKeen. On the night of Saturday, May 14th, I passed down Church street on the east side. I think it was before eleven o'clock. I stopped for a moment in front of Prouty's store; I heard three persons under the awning on the west side of the street, near McKeen's, muttering, and saw three persons cross from the opposite side. If they were not under McKeen's awning they were under Warner's.

There was a difference in their sizes. One was about Dr. Bradley's size; the smallest one was about as large as the McLane boy, who plays in the band. The medium sized one was about as tall as McDonnell, but not as large. I heard one of them say "There goes the damned son of a bitch now." They were then on the west side of the street and coming over from the sidewalk. The remark seemed to come from the largest one, who was behind the other two.

They stepped from the edging stone on the opposite side of the street and approached me as they made the remark. I then started on a rapid walk south. There was a light in Fath's saloon which shone across, and there was a man coming out from Fath's who turned back immediately. Supposing it was he to whom they referred, I did not hasten, but as I got near to Staniford's door the smaller one passed me at my left, and the medium sized one passing on my right stopped in front of me. The one who stopped on my right made a pass to strike me; as he struck I warded off the blow, and his blow passed just over my shoulder; and then I struck him and he reeled or fell. I then ran and locked myself in Roby's store. I heard them pass me there. They passed up College street and I heard them come back up Church street again. After they had passed I went to Reynold's saloon.

I think the largest man had got half way across the street, nearly opposite, when the others met me. I have never had any

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difficulty with either of these respondents. I knew Bain by sight, but not these others. The night was so dark that persons could not be seen under the awning across the street, but the form of a person could be seen when in the open street. (As to these localities, it is admitted that Fath's saloon stands back from the east side of Church street, nearly opposite Ferre's store, an avenue leading to it from the street; Prouty's store being on the street on the north side of the avenue, and Staniford's store on the south side of the same; that the band room was over the saloon, and that the place from which Mosher had come, in passing down the street, was some or ten or twelve rods north of this avenue.)

Cross Examination. The witness was requested to look upon the respondents and say whether they, or either of them, were the three persons who were spoken of in his direct examination. The witness looked upon the respondents and made answer as follows:

When these persons were pointed out to me yesterday, I felt convinced that neither of them was one that I saw that night, and I am still of the same opinion, that they or not the ones. The smallest one was a great deal smaller than either of these. The tallest one was not as tall as Bain, and heavier. The medium one was about the size of McDonnell, but taller. I said the other day when these men were pointed out to me they were not the men. The smallest one was not as tall as Kelly. I am always up quite late at night. My weight is about one hundred and thirty-four or one hundred and thirty-five pounds. McKeen was a much heavier man than I, and more square shouldered.

Direct Examination. There is an awning all the way on the east side of Church street. McKeen's whiskers and hair were very black indeed; mine are light.

Without other evidence of the identity of the respondents with the persons who attacked Mosher, the prosecution then offered to prove that there was a resemblance between Mosher and McKeen in their motions, gait, height, fashion of whiskers, etc.; to this testimony the respondents objected, but the court admitted the same. Upon this point the witnesses for the State testified as follows:

L. C. Bliss. I am acquainted with Mosher. I think Mosher is about the same height as McKeen, and in gait and motion

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resembles him a good deal. McKeen walked quick. McKeen's whiskers were about the same kind as Mosher's; his chin was shaved.

Cross Examination. I can't say whether McKeen wore a moustache. His whiskers came on his face more than mine. McKeen was a strong built man. I think he wore a sack or frock coat; he generally wore a hat. Have seen Mosher wear a drab coat. He generally wears a cap. Don't know whether he wore a hat or cap in May, 1859.

Noble B. Flanagan. I was acquainted with McKeen for about a year, and saw him almost every day. I have known Mosher about two years, and saw him often.

McKeen was heavier than Mosher by twenty-five or thirty pounds; he was a very little taller, and wore whiskers clear around his chin, as Mosher wears them. McKeen was a very quick motioned and energetic appearing man. Mosher's and his motions are alike, and I should think their gait was alike.

I knew Bain before his arrest, and Kelly. I did not know McDonnell before his arrest.

Bain and McDonnell both lived on Maiden Lane. Kelly lived nearly opposite Stanton's, on Church street. The most direct way to their home from Fath's would be up Church street, on the east side.

Cross Examination. I think McKeen weighs between one hundred and fifty and one hundred and sixty pounds. Mosher has usually worn a full beard formerly. I can't say whether McKeen wore a moustache. I can't say whether his chin was shaved at the time of his death. His beard was dark, but not black. His whiskers were curly and were kept carefully dressed.

William Brompton, for the State.

I was at Fath's saloon that night, May 21st, between nine and ten o'clock I think, and staid there until the murder was committed. The three respondents came after I did. I guess they came together. I believe I was there when they left. I think they left between ten and eleven o'clock, but can't say. They were drinking beer, playing bagatelle and smoking. They did not mingle with the rest of the company. I can't say where I was when they left.

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Samuel Johnson, for the State.

I was at Fath's saloon Saturday night, (May 21st) and left at about twenty or twenty-five minutes past twelve o'clock ; it might have been later. I saw McDonnell, Bain and Kelly. I did not see them go out, but they left before I did. Bain asked Kelly if he had a cigar, and they went to the bar and got one. McDonnell said, "let us go over and see what he has to do (or say) for himself." This was about eleven o'clock. McDonnell turned to Bain. Bain said, "no, let it go." McDonnell called the name, but I can't say what name. He did not say where the person was. I can't say how long after this they left.

Cross Examination. When I came out of the saloon I saw Flanagan, and he inquired if three persons had been in there within twenty minutes. This was an hour, or an hour and a quarter, after the remark of McDonnell.

Selding Patee, for the State.

I had a conversation with McDonnell about the killing of McKeen, on the morning of the arrest. I was in the jail to prevent them (the prisoners) from talking together. After talking with the other prisoners I talked with him. They were kept separate.

McDonnell said they were in Fath's grocery that evening, and came out and passed over to the door on the opposite side of the street, and Bain looked through the key-hole and asked them what they were about, and what the devil was trumps. Then McKeen came to the door, and asked them what they were doing, and who shook the door. McDonnell says, "what if I should say it was me, for instance."

McKeen says, "you ought to have your face kicked off, you whelp." McDonnell replied, "sail in you son of a bitch." McKeen then made a pass at him. "We then clinched ; I backed him on to the steps, and as he fell I knifed him." I asked him why he did so ? and he said, "he struck me, and I was'nt going to be licked." I then asked him when he took the knife out ? He said, "when he made the pass at me." I asked him if he ever had any trouble with McKeen, or any hard feelings ? he said he had not. I then asked him how it happened, and what it grew out of ? and he said, "he didn't know, it grew out of nothing."

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He then became very much excited, and I left him. McDonnell said nothing about falling on the knife.

Cross Examination. I think he said that when he came out of Fath's saloon he saw a light across the street.

I heard Bain's story first, then Kelly's, then McDonnell's.

The statement taken down by me from McDonnell was not of the transactions previous to the clinch.

G. G. Benedict, for the defence.

I know McDonnell. He was in our employ for three years and two or three months. He was an apprentice for us, in our printing office for three years, and was then employed by us as a journeyman printer. I was not at home at the time of the homicide.

I think I have seen this knife before. It resembles one that I have seen about the office, belonging to McDonnell. McDonnell was a pressman, and had occasion for a rather stout knife, and I have seen it on the press, and about the office.

Cross Examination. I can't say how long he had the knife before the homicide. I think he had used such a knife, or a large knife like this, for two or three years, perhaps all the time.

It was conceded by the respondents on trial, that McDonnell, Bain and Kelly were the three persons who were upon the outside when McKeen went to the door on the night of May 21, 1859; that the knife that was picked up from the floor shortly after McKeen's death was McDonnell's knife; and that the fatal wound was inflicted by the hand of McDonnell with said knife.

Upon this evidence the respondent, McDonnell, requested the court to charge the jury among other things:

1. That in order to constitute this act of killing, murder, the jury must find that it was done with malice aforethought.

2. That it was done with a formed design of doing mischief, and without sufficient provocation.

3. That it was done willfully and without sufficient provocation.

4. That whether or not the act of killing was committed with malice aforethought is a question of fact for the jury, to be determined from all the evidence in the case.

5. That if, upon the whole evidence, the jury have any reasonable doubt that the killing was committed with malice afore-

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thought, they should acquit the respondent of the charge of murder.

6. That if the jury find that McDonnell, without a previous intent or intentional preparation to kill McKeen, drew his knife after a fight commenced between them, by a blow from McKeen or mutual clinch between them, and then, in the heat of passion, McDonnell dealt a fatal blow with the knife, the jury should not convict him of murder.

7. That if the jury find that McDonnell, without a previous intent or intentional preparation to kill McKeen, was attacked by McKeen, and was struck by him and a fight ensued between them, and thereupon McDonnell, in the heat of passion, drew his knife and dealt McKeen a fatal blow, the jury should not convict him of murder.

8. If the jury should find that McDonnell, without a previous intent or intentional preparation to kill McKeen, while they were engaged in a mutual scuffle or fight, drew the knife with the purpose only of inflicting a wound not fatal, but in the scuffle the parties fell and McDonnell accidentally fell upon his knife, which was thereby thrust home so as to make a fatal wound, the jury should not convict him of murder.

II. As to the admission of McDonnell, as testified to by Patee, introduced by the prosecution :

1. That the whole of that admission must be taken together.

2. That the same must be taken as evidence in favor of McDonnell, so far as the same, or any part or parts thereof, are statements in his favor.

3. That the jury ought not to find to the contrary of such statements unless they find the same disproved by the other evidence in the case, and that if there is no evidence in the case incompatible with such statements, the same must be taken as true.

The court declined so to charge the jury, any farther than as embraced in the charge hereinafter detailed, but charged the jury as follows :

“ This case, gentlemen, is an important one, and imposes upon the court and jury duties not only *important* but *onerous*, and the State, as well as the accused, have a right to expect, yea, to

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demand of us a *faithful, impartial and independent discharge of those duties.*

The accused stands charged of having killed John T. McKeen on the night of the 21st day of May last, under such circumstances as to constitute murder.

It becomes necessary in the first instance to call your attention to two species of homicide, familiarly known as *murder* and *manslaughter*, and to point out, as clearly as we can, in what they consist, and the distinction between the two offences.

To constitute a homicide *murder*, the killing must be done with malice prepeuse or aforethought, but this malice may be express or implied; and when the act is done voluntarily, by the infliction of a wound with great violence with a deadly weapon, and upon a vital part, the malice requisite to constitute murder will be presumed, for the law infers that the natural and probable result of an act deliberately done was just what was intended to be effected by the person doing the act, and the burden of extenuating the offence is cast upon the accused in such a case. and unless such facts are proved on trial by the government witnesses, or by witnesses called by the accused, as would extenuate the homicide and reduce it to manslaughter, the malice would be implied from the act producing the homicide, in a case like this, when the wound was inflicted upon a vital part with violence and with a *deadly weapon*.

When we speak of murder being a *deliberate act*, the *deliberation* does not imply time and reflection; if it did, a *deliberate act* would never be sudden. If the person killing had time to think, and did intend to kill, though it was but for a moment, it would be a *deliberate, premeditated killing, constituting murder*, as much so as if the deliberation had been for an hour or a day. No time is too short for a wicked man to form in his mind a scheme of *murder* and to contrive the means of accomplishing it; 1 Hale P. C. note 452; 9 Metc. 107.

To constitute the *killing of a human being, murder*, it is not necessary that the person killing should have any special and particular malice towards the person killed. If the killing is attended with circumstances which indicate great wickedness and depravity of disposition, and a heart void of social duty and fatally bent

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on mischief, the offence will be murder. For the law by the term *malice*, in the connection in which it may be used relative to the crime of *murder*, means that the commission of the offence has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and a corrupt and malignant spirit; Foster C. L.; 1 Hale P. C. 449 note 2; 5 Cush. 304. And in trials of this kind it is to be borne in mind by the court and jury, that a man shall be presumed to intend the natural, probable and usual consequences of his own acts in the absence of evidence to show the contrary. See 9 Metc. 103.

Manslaughter is the unlawful killing of a man without malice, and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some *great provocation*, which in tenderness to the frailty of human nature, the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act not accompanied by any intention to take life; 5 Cush. 304. The *characteristic distinction* between murder and manslaughter is *malice express* or *implied*, and we have before said that the implication of malice arises in every case of *homicide* where the fact of killing is proved to have been occasioned by the violent and voluntary infliction of a wound by a deadly weapon upon a vital part which was calculated to endanger life.

If there are in such a case, in fact, circumstances of justification, excuse, or *palliation*, they must come from the *accused* unless they come out from the examination of the government witnesses upon an examination in chief or upon cross examination.

If, then, one person assail another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that he intended death, or some other great bodily harm, unless the presumption of malice is rebutted by some express showing.

If, however, death, though willfully intended, was inflicted immediately after a provocation was given by the deceased, which the law would deem *adequate* to excite sudden and angry passion and create heat of blood, such fact rebuts the presumption of malice.

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But still the homicide would be *manslaughter*, it being unlawful, because a man is bound to curb his passions, and if he does not he must answer for the consequences.

What is to be regarded as an *adequate provocation* to *mitigate* and reduce a homicide to manslaughter, which would otherwise constitute murder, is a question upon which it is the duty of the court to give you instructions.

It is a settled rule of law that no provocation by words only, however opprobrious, will *mitigate* what would otherwise be murder, to manslaughter. If, upon provoking language given, the party immediately revenges himself by the use of a deadly weapon, likely to cause death, as the use of a *heavy bludgeon*, an *axe*, or a *knife*, if death ensues, it is a homicide by *malice aforethought* within the true definition of *murder*, and is not by the circumstances mitigated to manslaughter.

The words "*malice prepense*" or "*aforethought*" in the description of the crime of murder do not imply deliberation or the lapse of any considerable time between the *malicious intent* to take life and the execution of the intent. They are used rather to denote *purpose* and *design* in contradistinction to accident or mischance; 5 Cush. 305. And if a man without justification, excuse, or extenuation, causes the death of another, by the intentional use of a deadly weapon, likely to destroy life, it will be murder, although the assailant only intended to do the person assailed some *great bodily harm*.

The reason is that in such a case he is responsible for the consequences upon the principle before alluded to, that he is to be taken to intend the natural and probable consequences of his own act, and consequently must answer for the execution of such intention; 5 Cush. 306.

To determine whether the killing upon *provocation* amounts to *murder* or manslaughter, the instrument wherewith the homicide was effected must be taken into consideration, for if it was effected with a *deadly weapon*, the provocation must be great indeed to lower the grade of the crime from murder to manslaughter; if with a weapon not likely nor intended to produce death, a less degree of provocation will be sufficient. In fact the instrument employed must bear a reasonable proportion to the provo-

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cation, to reduce the offence to manslaughter; Wharton, sec. 971; Wharton 194.

To constitute a provocation sufficient to reduce the offence to manslaughter, it is necessary there should have been a quarrel, and if when one is assailed with *great violence* or *great rudeness*, as by spitting in his face, he is inspired with a sudden impulse of anger which puts him upon resistance before time for cool reflection, and in this situation he attacks his assailant, even with a deadly weapon calculated to endanger life, and death ensues, the act would be regarded as done through heat of blood and violent anger, and not through malice or that cold blooded desire of revenge which constitute the emotion or feeling of a malicious passion; and in such a case the offence would be reduced to manslaughter.

But if the provocation is sought by the person accused to be made the occasion of gratifying a vengeful spirit, it will not extenuate the offence, however grievous such provocation may be, and the homicide would be murder; Wharton, sec. 971.

So if a homicide occur in *mutual combat* attributable to sudden and violent anger, *occasioned by the combat*, and not to malice, the offence would be but manslaughter, as in a *combat* between two persons, who meet at the same place *not intending to quarrel*, and angry words *suddenly* arise, and a conflict springs up, in which blows are given on both sides, it would be regarded as a *mutual combat* without *much regard* to who was the assailant. But in order to bring the case within the rule relating to mutual combat so as to lessen the crime to manslaughter, it must appear that no *undue advantage* was sought or taken on either side; Foster, 295. The occasion of this mutual combat must not only be sudden, but the party first assailed must be upon an equal footing in point of defence at the outset, and this is peculiarly requisite when the attack is made with deadly or dangerous weapons; 1 East P. C. 242. The true principle is well laid down in Wharton, on homicide, page 192. The court then proceeded to tell the jury:

You will, gentlemen, no doubt first consider the case as to McDonnell.

No question can be raised but what McDonnell killed McKeen

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on the 21st of May last, and that the killing was an unjustifiable homicide, and the real question is, was it murder or only manslaughter? We apprehend there is no ground to claim that McDonnell should be entirely acquitted of the charge against him.

I have not usually been in the habit of reciting the evidence verbatim and with great particularity to a jury, deeming it in ordinary cases not necessary, but in a case of this importance I feel it to be a duty.

Before proceeding further, I will read the minutes of the testimony of Wight, Bliss, Logan and Thayer.

(The court here read the minutes of their testimony.)

From the evidence in the case, the government claim that this is a case not simply of *implied* malice, but a case of *express* malice, and they rely upon having shown that an ill and malevolent feeling existed, especially on the part of McDonnell and Bain toward the deceased.

First, as being evinced from the transaction on the night of the 14th of May at the store door of McKeen.

Second, from the encounter with Mosher.

Third, from the testimony of Johnson.

Fourth from the facts and character of the transaction on the night of the fatal tragedy; from the manner of going to the door and making an assault upon it; from the opprobrious and insulting language used; from their speaking through the key-hole; from the fact that they made no reply to a civil enquiry of McKeen "what they were there for;" and from the reply to the enquiry, "which it was that came to the door," from the one standing opposite, "supposing it was me. what are you going to do about it," and from the reply to the inquiry, "what you did that for?" "None of your business, you d—n son of a bitch." Also, from the manner in which they came down and *stopped* and commenced the affray; and also that the affray was sought by the accused to give an opportunity to gratify a reckless and wanton spirit of wickedness or malevolence towards McKeen. If so, no provocation or heat of blood would mitigate the homicide to manslaughter. If under color of having a *mutual combat* upon equal terms, one of the parties was possessed of a deadly weapon, unbeknown to McKeen, and that he intended

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to use it at the beginning of the affray, and did so use it, and death ensued thereby, *this would be rank murder*, and it is no matter in such a case in what stage of the affray it was in fact used if the intention to use it existed at the beginning of the affray.

The government claim that McDonnell not only intended to, but did in fact use the knife, under color of having a mutual combat upon *equal terms at the very threshold of the parties coming together. If this was so, it is murder.*

This is to be inferred, the government claims, from the proximity of time in which McKeen fell after their meeting, and that no other cause is assignable why he thus fell at the hand of the assassin; and that nobody saw or heard of any blows between them, or any tripping. If there had been, the government claim that Wight, Bliss and Logan must have both seen the striking and heard the blows, as they were directly in front of the door and the light shining upon them.

There is no evidence in this case introduced to show that there was a scratch or mark on the body of McDonnell. Of course it is the duty of the court and jury, under the circumstances of the case, to presume that there were none. If there had been it is presumable that the respondent's counsel would have introduced the evidence of scratches or marks to show that he had an encounter. And no marks upon the body of McKeen are shown, not even a scratch, save the bruise of the shoulder, occasioned, no doubt, by falling, and what was made by the fatal knife.

It was claimed by the government that the knife was used at the very threshold of the affray, from the manner in which the knife entered the breast bone of McKeen, and from the impracticability that the knife could have been driven through the bone while the parties were in close contact, and that the wound could not have been given while both parties were down.

The wound must, it is claimed by the government, have preceded the fall for the above reasons, and because there was no other adequate cause for this fall. If McDonnell intentionally, without justification or excuse, stabbed McKeen with the knife, and it is found by the jury, that it was a dangerous weapon, and likely to destroy life, and the wound given in a vital part, and with the intention to do McKeen *some great bodily harm*,

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without any definite intention to take his life, and that McDonnell, regardless of consequences, so far plunged the knife into the breast bone of McKeen as to occasion his fall upon the knife, by which means it was driven home to its destination, by means of which the death of McKeen ensued, it would be murder, as much so as if it had been done under an actual and declared purpose of taking his life."

The jury were also told that if two persons have a mutual combat on equal terms and there is an interchange of blows, and one of the parties on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will only be manslaughter.

In regard to the attack made upon Mosher, the court told the jury that that testimony was admitted only upon the ground claimed by the attorney for the government, that he should prove that the attack was made at least by McDonnell and Bain, and upon the supposition and belief that it was the deceased instead of Mosher, and that if they found such was the fact it would tend to show express malice towards the deceased, but that unless they found this, the evidence was to be laid out of the case, and should have no effect, and in determining this they would look to the testimony of Mosher and all the evidence and circumstances bearing upon this point in the case.

As to the effect of the admission of McDonnell, as testified to by Patee, the court charged as follows:

"Where the government introduces the confession of a party accused, the whole must go to the jury, and they may give such credence to the different parts of it under all the circumstances attending the whole case, as they see fit. If they think the whole entitled to credence, they can believe it and give it effect. They are not obliged to believe any part of it, unless they think it to be true. They can give credence to the whole of it, or different parts of it, taking it in connection with all the other evidence connected with the case, or they can disbelieve the whole."

The court further charged as follows:

"The jury are to be satisfied beyond a *reasonable doubt*, that one

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or more of the accused are guilty, or they should return a general verdict of acquittal; and if they have a reasonable doubt whether the offence is murder or manslaughter, their verdict should be for the lesser offence."

But it is important to know what is meant by "beyond a reasonable doubt."

All that is meant is, that the jury from the evidence should feel an abiding conviction, to a moral certainty, of the truth of the charge; a mathematical or absolute certainty cannot be and is not required. If there is reasonable doubt the accused should have the benefit of it.

If the doctrine was, that an absolute certainty of guilt was required before a verdict of guilty could be rendered, it might be a convenient doctrine, *and mercy to the guilty; but it would be cruelty to the public.*" Here the court read from the opinion of Chief Justice SHAW, in the 5th Cushing, p. 320, from the words
to the words

which is referred to and made a part of this case; and the court told the jury that this was a correct exposition of what was to be understood by a reasonable doubt, and one which the court adopted, and gave them in charge, though the court remarked that some jurists would sometimes tell a jury that such a conviction of a truth as they would think it safe to act upon in the most important concerns of life, would be sufficient for them to act upon in the jury box.

I have a word in regard to the jury being judges of the law, as well as the facts.

That is the theory in some States and governments, while it is denied in others; and to me it is a most nonsensical and absurd theory, but for the purposes of this trial we charge you that such is the law of this State.

But you probably will not think that you understand the law of this case as well as the court.

And you would be *amply* and *fully justified* in relying upon the court for the law that should govern this case, and holding them accountable for that, though they have no wish to court responsibility. If they make a mistake against the accused, it can be corrected by a higher tribunal on exceptions.

see also
see also
see also
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If you make a mistake against the accused it cannot be corrected.

You will then, gentlemen, take the case. You have nothing to do with consequences. You are not sworn to look to consequences. Your oath is "a true and impartial verdict give according to the law and testimony given you in court."

In this case as in all others, persons whether convicted of *murder* or manslaughter, or of other crimes, are subjects of *executive clemency* by reprieve or pardon, and may apply to the legislature for a commutation of any sentence the court may be compelled by the existing law to pronounce upon conviction.

You can acquit one or more of the respondents, or all, if the testimony warrants it.

Under an indictment for murder, if that charge is not sustained, but the lesser one is, you can convict of manslaughter.

If McDonnell is guilty and is convicted of murder, the other prisoners, if they were present and aiding, encouraging and abetting him in the commission of that crime, are guilty of the same offence.

If McDonnell is convicted of manslaughter, the other prisoners if found to have been present, aiding, encouraging and abetting him in the commission of the crime, are guilty of the same offence.

Take the case and do your whole duty, and no more nor less than your whole duty. The accused gentlemen, are in your hands.

(Note.—Wherever references are made in the charge of the court to authorities, the court read such authorities to the jury.)

To the several rulings of the court above noted, to the refusal to charge as requested and the charge as given, the respondent, McDonnell, excepted.

Roberts & Chittenden, for the respondent.

I *The charge as to the confession of McDonnell.*

Taking the admission of McDonnell, as testified to by Pattee, *by itself*, it proved,

1st. That there had never been any "trouble or hard feelings" between him and McKeen before the affray.

2d. That an assault was made upon him, and a blow given by McKeen.

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3d. That the knife was taken out "when" (or after) the blow was given.

4th. That the parties then clinched, and that the blow was given just at the close of the struggle.

Couple these facts with the fact that McKean was the stronger man, and that the knife was the ordinary pocket knife of the respondent, and the offence is thereby modified to manslaughter.

Upon this the respondent asked specific instructions of the court, particularly directed towards restraining the jury from an arbitrary rejection of such parts of the confession as made for the respondent, to give the jury some legal rule for the regulation of their belief and for their finding.

The first request is in the language of the books. "Taking the whole admission together," means something more than that the whole confession must, in the language of the court, "go to the jury as evidence," i. e., be read or recited to them; it means that the whole must be received and believed, or acted upon as true, unless there be in the internal improbability of the relation, or in the other evidence in the case, what convinces the jury that the exculpatory part of the confession is untrue.

The second and third requests are more specific, and are sustained by many cases; Jones case, 2 Carr & Payne 629, 12 C. L. 292, and case before GARROW, B., therein cited; Higgins case, 3 C. & P. 603, 14 C. L. 476, 481; Clewe's case, 4 C. & P. 221, 19 C. L. 354; Steptoe's case, *ib.* 397, *ib.* 440, 519; *Carver v. Tracy*, 3 Johns. 427; *Wailing v. Toll*, 9 Johns. 141; *Credit v. Brown*, 10 Johns. 365; *Kelsey v. Bush et al.*, 2 Hill 440; *Newman v. Bradley*, 1 Dall. 240; *Tipton v. The State*, Peck 308, cited in 1 Cow. and Hill's notes 247-8.

Mattocks v. Lyman et al., 18 Vt. 98, is not inconsistent with these cases.

The charge upon this point is objectionable in that it left to the jury an arbitrary discretion as to the reception or rejection of the exculpatory parts of the confession. They may give such credence to its different parts "as they see fit." If they "think" it entitled to credence they "can believe it," not "obliged" to believe it unless they "think it to be true," etc.

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The last sentence of the charge lays down no more certain rule ; for the request is still unanswered, *how* is its connection with the other evidence in the case to affect it ?

It is therefore submitted,

1. That the respondent was entitled to the precise charge asked.
2. That the charge as given is loose and uncertain, giving the jury either no rule for their guidance, or a false one.

II. *The admission of the testimony of Mosher, Bliss and Flanagan, and the charge thereupon.*

The testimony of Mosher was admitted upon the claim of the prosecutor, that he should prove that the attack upon Mosher was made by the respondents, and that they supposed him to be McKeen, and that this was the motive to such attack.

If then there was a failure of proof on either point, the testimony went for nothing. Thus, if the attack on Mosher was made by other parties than the respondents, they could not be affected by it. Or if made by the respondents, but *not* on the supposition and belief that it was McKeen, it goes for nothing. and so was the charge ; but we submit, that the evidence did not tend to prove either of these facts. The first was disproved, and there was no evidence to prove the second.

If so, the jury should have been instructed to lay the testimony of Mosher out of the case, and the testimony of Bliss and Flanagan, as to the resemblance of McKeen and Mosher, should have been excluded.

III. *The charge upon the main question.*

The respondent asked only the difference in his behalf between murder and manslaughter.

The theory of his defence is found in the evidence, and he asked only that it should be fairly submitted to the jury.

That theory was this: that no pre-existing or express malice towards McKeen existed or was proved ; that there was no previous preparation for a conflict with McKeen, or intent to attack him ; that he was first assaulted and struck by McKeen ; that thereupon they clinched and struggled, and McKeen being the stronger man was overmastering McDonnell ; that this scuffle continued for from half a minute to two minutes, and that just

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at its close McDonnell dealt a blow with the knife, not fatal, when the knife was driven home by falling upon it; that this knife was the respondent's ordinary pocket knife, not designed, like a dirk or pistol, for the peculiar uses of homicide, and was snatched from his pocket, and used after a blow from McKeen, and a conflict actually commenced, and in the heat of blood excited thereby.

There was testimony in the case tending to support every branch of this theory.*

Such being the theory of the defence, and such the testimony bearing upon it, the respondent was entitled to claim of the justice of the court, that both the theory and the evidence should be not ignored, but presented fairly to the consideration of the jury, with apt instructions. Not for the purpose of creating an obligation upon the court so to do, but as a guard against a possible omission from carelessness or one sided views, the attention of the court was called to our views by specific written requests, being the 6th, 7th and 8th.

The charge of the court is in three divisions.

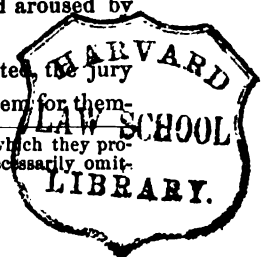
1st *A general dissertation occupying two pages of the printed case upon the subject of murder, with copious excerpts from the text books of elementary principles.*

This is, in the main, well enough as a general law lecture, but, without a more specific application to the facts of this case, it is, for the most part, out of the region of present criticism. We will only notice the two last sentences of the lecture.

If this part of the charge is to be treated as having an application to the facts of this case, as anything else than judicial speculation, the question arises, what is *undue advantage*? Is it not taking an *undue* advantage to kill at all? If not, is it not taking an *undue* advantage to use the means of killing, which one may happen to have about him, although not intended for such use, and being laid hold of in the heat of blood aroused by the combat?

Upon these, and like questions likely to be suggested, the jury received no instructions. In attempting to answer them for them-

* That portion of the brief of the respondent's counsel in which they proceeded at length to show this tendency of the testimony, is necessarily omitted for want of room.—REPORTER.



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selves, the jury would be apt to err. If they applied the formula to the taking of an advantage "in the heat of blood," it would be clearly an error, (1 East's P. C. 238) And this error the charge leaves men free to make.

But the last sentence, if to be applied to the facts of the case, is a glaring misdirection.

As a principle, without limitation, it is false. It is a misquotation and perversion of the authority cited, (1 East's P. C. 242.)

The authority cited limits the proposition to the case of the party on trial *who made the first assault*. This is omitted in the proposition as announced by the court.

Now suppose the jury found that McKeen made the first assault, and that McDonnell was "the party first *assailed*," then it is not true, that to reduce the offence to manslaughter McDonnell must have been "upon an equal footing in point of *defence* at the outset;" an *equal* footing, i. e., neither better nor worse.

If this be so, it would follow, that the fact that McDonnell happened to have a knife in his pocket, at the commencement of the combat, when McKeen had none, would make McDonnell of necessity a murderer, although McKeen first assaulted him, and the knife was used upon provocation and in the heat of blood excited by the combat.

If it be said that the court read the passage correctly from the book cited, it may be answered that such reading was rather for fortifying the propositions announced in the charge, than as intended to make the authority read a part of the charge, or as modifying it.

2d. *One page of comment upon testimony and of argument to prove that McDonnell was a murderer.* Indeed, he is called an assassin, *co nomine*.

This part of the charge bristles all over with italics, like daggers, and drips blood at every sentence.

3d. *A possible reference to the theory of the defence, embraced in three lines and a fraction.*

But this lone paragraph makes no reference to the requests of the respondent, to the theory of his defence, or the evidence bearing upon it. All these are ignored. This was calculated to mis-

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lead the jury, and was error; *Parker v. Donaldson*, 6 Searg. & Watts 132; *Relf v. Rapp*, 3 Ib. 21.

This part of the charge is a mere enunciation of an elementary principle, without application suggested to the facts of this case, and so enunciated that if applied by the jury it was sure to mislead them; *Mason v. Silver*, 1 Aik. 367; *Gorman v. Campbell*, 14 Geo. 137; 14 U. S. Dig. 558, secs. 75, 76.

Thus a combat "on equal terms" is not defined. An "interchange of blows" is made an element. *Snatching* up the deadly weapon is made an element.

This leaves the jury to infer that the combat was not on equal terms, if McDonnell had in his possession an instrument which could be used fatally, although this was his ordinary pocket knife, and was neither designed in its construction, nor intended by McDonnell for such use. Also that the sudden and impulsive taking of the knife from the pocket was something different from the *snatching* up of a deadly weapon.

Where there is no marked disparity in the strength of two parties, the inequality of the terms of combat, spoken of in the books, implies a purpose in advance to resort to the use of a weapon, and not merely that one may happen to be in a more favorable situation than the other, to resort to the use of a weapon after his blood has become heated; Whart. Cr. L., secs. 985, 998; 1 East C. L. 242-3, citing Mawbridge case.

So of the *snatching* up of a weapon. If the instrument is about the person for honest uses, and is suddenly seized in the heat of blood, it is *snatched* up; and the possession of it cannot be referred to an intent in advance to use it, without other evidence; nor can the man with propriety be said to be armed; BAILEY, J., in *Whitely's* case, 1 Lew. 173, cited in Whart. Hom. 192; BAILEY, J., in *Rex v. Anderson*, 1 Russ. Cr. 531, cited in Whart. Hom. 192 and 193, commencing at the point where Judge BENNETT *stopped* reading.

The respondent was entitled to a charge, applicable to his own theory of the defence, and the facts, as he claimed them to be, if there was any evidence tending to prove them; and this general theorizing and enunciation of abstract propositions, however sound and accurate, do not come up to the requirements of the law as

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to a charge; *Whitney v. Lynde*, 16 Vt. 579; *Hazard v. Smith*, 21 Vt. 123; *Clark v. Tabor*, 28 Vt. 222.

4. *The charge as to the jurors being judges of the law as well as of the facts.*

By the law of this State, jurors, in criminal cases, not only have the power, but it is their right *and duty* to judge of and decide the law of the case; *State v. Croteau*, 23 Vt. 14.

This is "a most nonsensical and absurd theory," quoth the judge.

As a question of taste and judicial propriety, there can be but one verdict as to this attempt of, the judge to fly-blow the established law of the State. But it is more than a venial violation of judicial decorum; the charge contains revisable error.

If in the distribution of the political powers of the State, this power is devolved upon jurors, as a branch of the courts, thus giving a right and so imposing a duty to determine the law, a responsibility is created which they cannot shuffle off upon the judge.

Of necessity, they must exercise their own judgment as to the law, with such aids as the arguments of counsel and the charge of the judge may afford; but inasmuch as it is their own judgment that must decide the law, they cannot be "*justified* in relying upon the court for the law," when the conclusion of their judgment is that the charge of the judge is not the law.

The jury are not more exclusively the judges of the facts in civil cases, than of the law in criminal. Now although in civil cases the judge may, if he pleases, give his views as to the facts, it would be clearly error to charge them that he probably better understood the facts than they, and they would be "*amply and fully justified* in relying upon the court for the *facts* which should govern the case." Nevertheless by the law of this State they were judges of the facts, yet "a most nonsensical and absurd theory."

We submit that it is an error revisable if the judge shall, from mere persuasion or suggestion, induce the jury to go wrong, or to absolve themselves from responsibilities which the law casts upon them; *REDFIELD, J.*, in *Stevens v. Talcott*, 11 Vt. 30; *Benham v. Corey*, 11 Wend. 83.

F. R. Hard, State's attorney, for the prosecution.

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REDFIELD, Ch. J. I. The first objection made to the fairness of the trial in the court below, and which seems to be regarded by the prisoner's counsel as showing, to some extent, that the *animus* of the whole was unfavorable to their client, is the alleged terms of disrespect in which the judge made allusion to that rule of law now recognized in this State, that the jury may judge of the law as well as the fact, in criminal cases. Any attempt on the part of a judge, in the trial of an important criminal case, to prejudice the jury against an established rule of law applicable to all cases, or to the particular case, would very justly expose him to severe criticism. But we do not feel that such is precisely the present case.

The rule of law referred to is strikingly peculiar, as applicable to jury trials. Where the judge and jury are both required to assume their distinct and proper functions, the one of the law, and the other of the fact, it will scarcely be claimed to have any just application to ordinary cases. It surely will not be claimed that the object and purpose of the rule is to enable ingenious and eloquent counsel to procure the acquittal of guilty persons, by inducing juries to put a misconstruction upon the law, in opposition to the charge of the court. Nor that the jury are really more competent judges of the law than the court are.

The most which can fairly be claimed in favor of the rule is, that it is one of those great exceptional rules intended for the security of the citizen against any impracticable refinements in the law, or any supposable or possible tyranny or oppression of the courts. It has always been regarded as belonging rather to the department of governmental polity than to that of jurisprudence, in the strict sense of that term, and in that view is more justly considered a political than a legal maxim.

It has indeed been claimed, as one of those great landmarks, defining, and intended to secure the enforcement of English liberty, which, although always more or less in conflict and dispute, between the advocates of prerogative on the one hand, and of the largest liberty of the subject on the other, in that country, from which we in fact derive the principle of the rule; and which, because it is an exceptional rule, will always be likely to be characterized as an absurdity by the mere advocates of logical sym-

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metry in the law, will nevertheless be sure, in the long run, to constantly gain ground, and become more and more firmly fixed in the hearts and sympathies of those with whom liberty and law are almost synonymous, and may therefore be regarded rather as an instinct, or a sentiment, than a mere logical deduction. It is therefore not a thing to be much reasoned about. It is a power, perhaps, more strictly than a right, in its primitive existence, but such a power as would be less likely to be wrongly exercised by juries when it was conceded, than if kept in perpetual conflict by occasional and sometimes acrimonious denials on the part of the court.

It is upon this ground that I, for myself, long before the distinct recognition of the rule by this court, in *State v. Croteau*, 23 Vt. 14, came to the conclusion that it was best, as a matter of prudence, not to allow the question to be brought into contest between the court and juries. Let juries feel that they have the power and the right to judge of the law in criminal cases, over the heads of the court, and that they may do this in all criminal cases, if they choose to take the responsibility, and in practice it will be found that they will not do it, except in extreme cases. And in such cases it is perhaps proper enough that they should do it. Judges are liable to their full share of infirmity and error, and courts of the last resort will sometimes fall into errors of so grave and serious a character as to require the modification of the common sense instincts of the more unsophisticated. This, in civil cases, is well enough left to the interference of the legislature, but in criminal cases, affecting life, or character, or liberty, such a resort would come too late.

But we see no objection, where the interference of a jury is directly invoked in a criminal case, to the judge stating to the jury, in his own way, that this rule is not intended for ordinary criminal cases; that it is matter of favor to the defendant, and should not be acted upon by the jury, except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court, must be taken solely upon their own responsibility; and that the safer, and better, and fairer way, in ordinary criminal cases, is to take the law from the court, and that they are always justified in doing so.

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This is substantially what was done by the court below, and we see no just ground of exception to the mode in which it was done. The declarations of the judge were explicit, and characterized by directness and plainness of speech, and this is, in general, a desirable quality in a charge to the jury. It may be carried too far, and thus become objectionable, like every good thing in excess, but it does not occur to us that this portion of the charge was specially objectionable on that ground. Men will differ in their views as to the best manner of dealing with such delicate questions between the court and jury. Perhaps the surest mode of keeping the jury within their proper functions is for the court not to trench upon their own peculiar province, and not to evince any suspicion that they will not reciprocate the courtesy. I think the more common fault of juries is to strive, by disagreements, or in some other mode, to escape the necessity of taking their own just share of the responsibility, rather than to usurp the proper province of the court. This is undoubtedly the more common fault with us all in important trials.

II. The mode in which the defendant's confession was put to the jury might be liable to misconstruction, no doubt. The jury were told that it must "go to the jury as evidence, and they might give such credence to the different parts of it, under all the circumstances attending the whole case, as they saw fit." It is claimed that this last expression might, naturally enough, be understood by the jury as giving them an arbitrary discretion to use only that portion of it, in making up their verdict, which made against the defendant. It is certainly not probable the jury would have so understood the charge. And as we are bound now, while revising the case upon error, to make all reasonable intendments in favor of the proceedings below, we shall hardly feel justified in opening the case upon this ground alone. We may refer to this subject again.

But, to guard against possible misapprehension, it is proper to add here, that in cases of such magnitude, where the State resort to the confessions of the defendant, as evidence against him, it requires that considerable care be used by the court, lest, either in the mode of obtaining or the use made of such confessions injustice be inflicted upon the accused. The general public senti-

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ment upon the subject, that there is no danger of one suffering from his own confession, although natural and commendable, as evincing a desire not to have the guilty go unpunished, is certainly not based either upon sound logic or wise experience.

From the general rule, known to all, that the declarations of one accused of crime are not evidence in his favor, but are evidence against him, a common jury might not unnaturally come to the conclusion that the same rule should apply to the different portions of his confession, as it is called, when used in evidence against him. And it must be admitted that although the charge upon this point is sufficiently guarded against such misapprehension, when viewed in the light of the legal rule upon the subject, yet when interpreted by the popular sentiment upon the question, it is quite susceptible of being so understood as to countenance that acceptance. The case did seem to require that the jury should be made fully to comprehend that the declarations of the defendant in his favor were the conditions upon which those against him rested, and if used as evidence against him, he might fairly insist upon the conditions being maintained in his favor, unless disproved either by the other circumstances, or testimony in the case, or their own innate improbability or inconsistency and absurdity. The refusal of the court to respond to the request to give more definite instructions upon this point, was calculated to impress the minds of the jury in favor of a strict construction of those declarations of the defendant, which tended to exculpate him, and a more liberal one of those which made against him. And the failure of the judge, in summing up, to allude to this confession, as containing any possible circumstance of exculpation, would tend very much to confirm the jury in any impression they might have that it was not to be weighed in that direction. From all which it is obvious that if the charge was not positively erroneous on this point, it certainly was not so fully guarded against misconstruction as was desirable.

III. In regard to Mosher's testimony, the only question made is, whether it should have been suffered to go to the jury in the final summing up. This will undoubtedly strike different minds differently. If there was really any uncertainty in regard to the defendant having made the assault upon Mosher, as there was

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confessedly very considerable doubt whether the person making the assault could have mistaken Mosher for the deceased, McKeen, the two uncertainties combined would increase the doubt in a compound ratio, and thus render this testimony too indefinite to go to the jury at all. One gets a far more vivid, and generally a more correct apprehension of the true force of such circumstances, from hearing the whole trial and argument upon the facts. I should hesitate, therefore, to speak with perfect confidence upon a matter of this kind, so as to open a case for new trial upon this ground alone, until I had taken time to so study the case in detail as to impress all the facts upon the memory in such a way as to be able to view each particular fact and circumstance in all its relations to the other facts and circumstances of the whole case, and thus feel sure I could comprehend its true bearing and force, both positively and relatively. My present impression is, that, in a case affecting life, testimony of this loose and unsatisfactory character ought to be wholly excluded from the consideration of the jury in the final summing up. It could not properly have been excluded upon the offer made in connection with this proof. But if, when all the evidence was in, the theory upon which it had been received was not sustained by any evidence, but rested in mere possibility or conjecture, about as likely to be false as true, the consideration of the evidence should not have been allowed to the jury. But this point is not intended to be definitely decided; it strikes the members of the court differently.

IV. But the most serious ground of complaint, in regard to the trial in this case, seems to us to arise upon the charge affecting the general nature of the offence.

1. The practice of reading books to the jury, in the manner and to the extent it seems to have been done in this case, affords a most significant commentary upon the general theory of making juries really attempt to settle the law, upon their own responsibility, in the ultimate decision of every criminal case, the same as they do the facts. One might almost as well, for any purpose of actual enlightenment, give the jury general treatise upon criminal law, and tell them the whole law applicable to the case would be found under the title homicide, or manslaughter and murder.

It is unquestionable that a common jury are, from their general habits of study and reflection, quite incapable of so comprehending general abstract propositions of law, read consecutively from a book, as to make any safe and judicious application of them to the facts of a particular case, and especially a case of this character. But we are aware that this is often done in those States where the courts of last resort have trials for murder before them in banc, and formal opinions upon the law are expected to be given, and this is of necessity done in the presence of the jury; but the formal opinion of the court upon the law is intended rather for the profession, and the published reports, than for the enlightenment of the jury. That must be done after the general principles of the law of the case are settled, by applying them to the particular facts attempted to be proved in the case.

2. We do not understand that the law read from the books in this case was intended to qualify the general propositions laid down in the charge; but that it was read merely in confirmation of what is contained in the charge. It is intimated, in the argument for the prosecution, that if the general propositions laid down in the charge are erroneous, or require qualification, this court will look for that in the books there referred to. This we clearly could not do without knowing, with certainty, what particular portions of the books referred to were read to the jury. This we have no means of determining, as the passages are neither copied into the charge nor definitely described, so as to be capable of identification. It is obvious, from the blanks left, that it was at one time the intention of the judge to do so, but it has not been done, and we cannot now do it. The charge must therefore be taken as it stands upon the bill of exceptions.

3. This seems very correct in the main. But mere abstract propositions of law, whether read from a book or not, afford but an imperfect guide to a common jury in the determination of a complicated case. The most learned, experienced and correct judges often misapprehend the proper application of general principles of law to the facts of a particular case. That is the principal uncertainty which arises in the trial of causes. It is not often that the counsel, in a case of this character especially, differ much as to the principles and rules of law applicable to the gen-

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eral subject. The general definitions of murder and manslaughter have been well settled for centuries. The only uncertainty arises in regard to the application of these recognized and familiar principles to the ever varying facts and circumstances of particular cases as they arise, no two of which are precisely alike, or ever will be, and most of which are infinitely varied, in particulars more or less important, from every adjudged case in the reports.

4. There is one marked feature in this charge which, in any view we have been able to take of the case, seems to us incurable. The entire theory of the defence, with the exception of a single sentence in the charge, which had no natural or just application to the facts of the case, is studiously and strenuously denied and disregarded. The only sentence in the charge, after the judge leaves the general prefatory propositions and enters upon the particular case, in which the distinction between murder and manslaughter is brought into view before the jury, was certainly not framed with any view to the particular case. It is taken verbatim almost from Wharton on Homicide, page 192, and refers to the case of *Rex v. Anderson* and Russell on Crimes 581, and is therefore solely applicable to another case, and by consequence is the same as a mere abstraction, so far as this case is concerned. It has then no just and proper application to the facts and circumstances of this particular case. It is in fact, as it seems to us, even more objectionable, on some accounts, as applied to this case, than an entire omission; for if the jury attempted to apply it to this case in any literal sense, (and they are not, in my judgment, required or supposed to be capable of any other except a literal application of the law given them to the particular case, and it is therefore the duty of courts, in their instructions to juries, to make the law applicable to the particular case, and not to deal in mere abstractions;) if then the jury attempted to make any such application of this portion of the charge to the facts of this case, it certainly must have led them to the conclusion that there was nothing in the case tending to show that the offence might have been manslaughter. And this was unquestionably the view taken of the case in the court below, the only one which makes the charge consistent and reasonable. But we think this view,

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although strongly supported by much of the evidence, is not maintainable as the only view to be taken of the case.

5. We will, therefore, examine the case upon its merits, as presented in the facts detailed upon the bill of exceptions

The principal point of inquiry, as affecting the merits of the trial, is the evidence tending to show that the offence might have been only manslaughter. This is the important and proper point of inquiry in all cases of this character, since it is the duty of the court, upon common principles of humanity and justice, first, to pronounce the criminal innocent until he is proved guilty; and, secondly, after he is shown to have committed a homicide, to look for every excuse which may reduce the guilt to the lowest point consistent with the facts proved. There is, in the present case, still further reason for directing inquiry towards this point, inasmuch as we have seen that the county court evidently did not feel justified in giving the prisoner the benefit of any such construction of the evidence as would reduce the offence below the grade of murder.

We need not inquire, in regard to the law of homicide, further than the facts in this case seem to require. Some question is made in the argument in regard to the *prima facie* presumption of malice, resulting from the mere fact of death, by the hand of the accused. It does not seem important here to discuss that question, as the proof shows the manner of the death. There is no doubt that such a rule as that laid down by the court in this case, that the law implies malice from the killing with a deadly weapon, and thus imposes upon the accused the burden of showing the contrary, has long been recognized in the courts both of this country and England. The rule is thus expressed in 1 Hawkins' P. C. 82, ch. 131, sec. 32, "That wherever it appears that a man killed another, it shall be intended, *prima facie*, that he did it maliciously, unless he can make out the contrary, by showing that he did it on sudden provocation," etc., citing Kelyng's Reports of Crown Cases, temp. Charles 2, 27. The same general proposition is substantially repeated in all the subsequent treatises and reports where the question has arisen; but it seems to have been done without much examination, and one might be

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allowed to question its application to the mere fact of killing, since, being but a presumption of fact, in the absence of all evidence in regard to the mode of death, the presumption of innocence must be allowed to prevail over that of malice. But the mode of inflicting death often indicates, with more or less force, the motive and the probable degree of deliberation. Killing by poison clearly indicates malice, where the poison is given in such quantities as ordinarily to produce death. The same may be said when death is produced by resort to a deadly weapon, upon a vital part. This results from the presumption stated in the charge, that one intends the natural consequences of his acts. We see, therefore, no ground to complain of the rule, as qualified by the judge in this case. This is undoubtedly one of those points where the jury should be expected to judge for themselves, as it is a subject which they understand as well as the court, since it has reference to matter of fact, rather than of law. And where a rule of this character is attempted to be applied to a case to which it was never intended to have any application, as, for instance, to the mere fact of killing, as the rule, as laid down in *Hawkins* and in most of the treatises, might be made to apply, it must be, in my judgment, eminently suitable and proper that the jury should be allowed to test the force of the rule, as laid down by the judge, even by the application of their own experience and common sense instincts, to the rule itself. I should never question the right of a jury to revise, in criminal cases, any question of law so entirely within the range of their own knowledge and experience. One could scarcely be expected to find a verdict upon a rule of law, where his own conscientious convictions were so capable of a direct application to the rule, and where it did violence to the common experience of mankind. But it is not often, perhaps, that a rule of law is susceptible of so clear and narrow a ground of trial, or that it is so much at variance with common experience as to infer malice, from the mere fact of killing. But in the present case the wound indicated malice, whereas, if the deceased had died by the fall itself, without the stab, the natural presumption would have been the other

way.

1. The first clear point in this case, established by almost the

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entire testimony, is that it was a case of conflict, or mutual combat, at the moment of the encounter. We leave out of question here all evidence of previous malice. At the time nothing had occurred, or was occurring, which called for forcible interference on the part of the deceased. The rattling of his door, and the ribald speeches connected therewith, had ceased. The accused was quietly passing along the sidewalk. He was questioned in regard to what he had done, or why he did it. He made an evasive and insulting reply. But this gave no occasion for McKeen to interfere forcibly. But the witnesses all concur that he did advance to meet the defendant, that he met him about half way. The witnesses could not say which moved the swiftest; thought the defendant did, but not sure. They were about six feet apart when both advanced, and met about half way. This is certainly not an attack solely on the part of the prisoner. He may have been, and probably was, the remote cause of the conflict; but it seems probable enough, from all the testimony as to the mode in which the encounter began, that McKeen might have avoided it if he had so chosen.

Being, then, a case of mutual combat or conflict, it does not appear very clearly which struck first. Both seem to have been in a state of preparation for the encounter; the witnesses so describe McKeen. Each, it may be fair to conclude, intended to strike first, and to disable his adversary, so as to put him out of the combat or bring him to terms. The confession of the defendant attributes the first blow to McKeen. In a case of mutual combat, it does not seem to be regarded as important to the character of the homicide which did give the first blow. The *prima facie* presumption in regard to all such encounters upon equal terms is, that neither intends to kill or do grievous bodily harm to the other. But if there is evidence of a murderous intent at the time of beginning the affray, the homicide will be murder. It is upon this ground that the law places stress upon the parties being upon equal terms in the beginning of the conflict; for if one take a deadly weapon into the affray with the design of using it in the fight, and especially if this be unknown to the other party, it will afford strong evidence of malice. Hence, if a man draw his sword before the other has time to draw, and thrust his

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antagonist through the body, whereby he dies, it is murder, for it shows a purpose of killing, in the first instance.

3. But in this part of the case we do, as we said, lay out of the account all evidence of previous malice; for if that be shown to the satisfaction of the jury, and that the prisoner sought the encounter for the purposes of revenge and punishment of the deceased, although he might not have intended to take his life, it is nevertheless murder when death ensues. And this is said to be the result, although in the fight the assailant "be driven to the wall, and there kill his antagonist in self defence," because he is "guilty of murder in regard to his first intent;" 1 Hawkins' P. C. ch. 31, sec. 26, citing Hale's P. C. 47; Kelyng, 58, 129.

4. But I understand the true rule, as to *bona fide* cases of mutual conflict, is well laid down in 1 Hale's P. C. 456, citing Foster, 297. That although bare words are not such provocation as to lessen the crime to manslaughter, "yet, if A gives indecent language to B, and B therefore strikes A, but not mortally, and then A strikes B again, and then B kills A, that this is but manslaughter, for the second stroke made a new provocation, and so it was but a sudden falling out; and though B gave the first stroke, and after a blow received from A, B gives him a mortal stroke, this is but manslaughter, according to the proof; *the second blow makes the affray.*"

5. If, then, the jury should regard this as a *bona fide* case of mutual combat, without previous malice on the part of the accused, and that mutual blows were given before the accused drew his knife, and that he then drew it in the heat and fury of the fight, and dealt a mortal wound, although with the purpose of doing just what he did do, that is, of taking life, or what would be that intent if he had been in such a state as properly to comprehend the nature of his act, still it is but manslaughter.

6. Although, therefore, it must be admitted that so mortal a wound, inflicted with such a weapon upon so vital a part of the person, upon such slight provocation, must always excite in the mind of the thoughtful and considerate, strong apprehension that it did result from a murderous purpose; yet it seems to us that there was a good deal in the case calculated to impress the minds of the jury with a more favorable construction towards the

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defendant, and that it should, therefore, have been submitted to them with instructions applicable to the particular facts.

1. It was clearly a case of mutual combat, and continued for such length of time that mutual blows might have been, and probably were given.

2. The defendant's declarations, given in evidence by the prosecution, all of which are made evidence, was that McKee gave the first blow, having previously used insulting language.

3. The knife, by which the mortal wound was inflicted, is not shown to have been one which the defendant did not ordinarily carry about him. It appears to have been one in constant use about his business, and, very likely, might have been constantly carried about his person.

4. There is no direct proof when it was drawn, or with what specific intent. That is matter of inference, in regard to which there is undoubtedly room for debate.

5. The medical testimony appears to my mind to favor the conclusion that the fatal character of the wound might have been caused by the fall. If the construction of the principal medical witness is entirely correct as to the suddenness with which death would ensue, and especially the absolute incapacity of the wounded person to continue the struggle, or even to speak, after the full penetration of the knife into the heart, it would seem almost certain, from the other testimony, that the conflict must have continued a considerable time, long enough for the exchange of blows, before the knife was resorted to, and that when first struck it only penetrated into the breast bone, not reaching the heart, and probably not reaching the large nerve named, and that it was thrust through to its fatal result by the fall. It is not improbable that further examination and reflection may somewhat qualify this theory in the opinions of the medical witnesses. It seems to me, however, scarcely possible that so fatal a wound could have been inflicted to the full extent, until the very close of the affray. The time of inflicting the wound is important chiefly in reference to another question, the existence of a previous purpose of using the knife in the combat; for if that point is established against the defendant, to the satisfaction of the jury, it makes the homicide a clear case of murder.

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The strongest point against the defendant, in this view of the case, arises from the improbability of his being able, in the very short time which elapsed during the affray, and in so heated a contest, to have drawn and opened his knife. But if the spring of the knife were moderate, or considerably worn, this might possibly be done with more facility than is now altogether obvious to us. At all events it is a point which the defendant has the right to have the jury consider, with every other question of fact, or circumstance, or inference, or probability, in his favor, none of which seem to us, so far as the defence is concerned, to have been properly submitted to their consideration at the trial. And unless we could fairly say that there was no testimony in the case tending to reduce the crime to manslaughter, we could not feel justified in passing sentence of death, until that testimony had been fully submitted and fairly weighed and determined by the jury, whatever we might think of the probable result. That is not a question here.

It seems to me, that if the jury should not find the fact that previous malice existed on the part of the prisoner towards the deceased, of a character which induced him to seek the quarrel, or that he went into the affray with his knife drawn, or with the intention of using it, or thinking of it as a possible resort in case of convenience, to be used in the affray; but that his drawing and using it was altogether an afterthought, subsequent to the encounter, it must be regarded as a case of manslaughter. In this view of the case it must be altogether conjectural whether the defendant would conceive the idea of killing at all; and if he did, in his blind fury, it could not fairly be presumed to have been done with any such deliberation as to constitute murder, unless there is some distinct evidence of more coolness than ordinarily exists in such cases. This is the doctrine laid down in the books, and it corresponds with my own experience in the trial of a considerable number of cases of homicide, in cases of mutual contest. There will be likely always to be such evidence of heat of blood as to render it too doubtful, in regard to the existence of deliberate malice, to allow the jury to convict of murder, unless upon distinct and satisfactory evidence of previous malice.

In every other view the case wears very much the aspect of

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murder. For the rule laid down by the court, that if the design to kill were formed deliberately, for ever so short a time before the infliction of the mortal wound, or if it were formed without such provocation as the law regards as sufficient justification for anger and heat of blood, that is, upon mere words, however provoking, and before a blow were given by the deceased, the offence is murder, is undoubted law. And if one inflict a mortal wound with a deadly weapon, like a sharp knife, upon a vital part, as in the present case, it is a presumption of fact that he did design the natural consequences of his act; and it is murder, unless he shows that the result was not designed, or it was done in heat of blood, upon legal provocation.

So, too, if the prisoner went to this store with the purpose of drawing the deceased into a fight, and then after he had succeeded, resorted to the use of a deadly weapon upon a vital part, and death ensued, it is a fair presumption of fact that he intended to take life in the outset, either absolutely, or, if it became necessary in order to overcome the deceased, and in either case it is murder.

So, too, on the other hand, if the prisoner went there without any thought of a fight, or entered the fight without any thought of using his knife, and after receiving a blow or blows, got so heated in his blood as to be incapable of acting with deliberation, and having no deliberately formed feelings of malice or revenge, seized upon the first weapon he could lay hold of, and that happened to be this knife, and dealt the mortal blow, although in his mad fury he struck where he supposed he should most damage his adversary, it is still but manslaughter; even if the jury should think the defendant intended to kill, or did that in his madness which he must have supposed would kill, if he were capable of estimating consequences.

In this view, the point of time and the manner of inflicting the mortal wound is of great importance to be considered by the jury. And it will be affected to a considerable extent by a consideration of the length of time the conflict continued, what was done, whether this could have been done after the fatal wound was inflicted, or how much of it could have been done after that. It will of course not escape the consideration of a jury, in this

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connection, that the mere estimate of time, by witnesses under such circumstances, is proverbially imperfect, and very liable to seem, many times, longer than it is. This will be corrected by the comparison of different estimates, and more especially by the particular acts which transpired.

The law of manslaughter is very correctly defined by Chief Justice SHAW, in Webster's case, 5 Cush. 295. "Manslaughter is the unlawful killing of another, without malice, and may be either voluntary, as when the act is committed *with a real design and purpose to kill, but through the violence of sudden passion occasioned by some great provocation*, which in tenderness for the frailty of human nature the law considers sufficient to palliate the offense; or involuntary, as when the death of another is caused by some unlawful act, not accompanied with any intention to take life." "Every man, when assaulted with violence or great rudeness is inspired with a sudden impulse of anger which puts him upon resistance before time for cool reflection, and if during that period he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood, or violence of anger, and not through malice or that cold blooded desire of revenge which more properly constitutes the feeling, emotion or passion of malice."

From all we have said it will be obvious that the first point of inquiry before the jury, will be in regard to the existence of pre-conceived malice on the part of the defendant, before he went into the combat. In this view, the nature and character of the wound, and the manner of its infliction, will have an important bearing.

This being got over, the second leading inquiry will be as to the existence of any legal provocation, such as a blow or blows inflicted by the deceased, and the occurrence of hot blood in consequence. The defendant having established the negative of the former, and the affirmative of the latter, or rendered them fairly doubtful in the estimation of the jury, will be entitled to claim a verdict of manslaughter, otherwise he is guilty of murder, from the nature, extent and consequence of the wound.

The verdict is set aside and a new trial granted.

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JAMES NICHOLS v. JOHN MUDGETT.

Illegal Contract.

The defendant being indebted to the plaintiff, who was a candidate for the office of town representative, the parties agreed that the former should use his influence for the plaintiff's election, and do what he could for that purpose, and that if the plaintiff was elected, that should be a satisfaction of the plaintiff's claim. Nothing was specifically said about the defendant's voting for the plaintiff, but he did vote for him, and would not have done so, nor favored his election, but for this agreement. The plaintiff was elected. No actual discharge of the debt was given by the plaintiff after the election. *Held*, that this agreement was entirely void, and constituted no bar to the plaintiff's recovery of his debt.

It is not necessary to the invalidity of such an agreement that it should be secret, or stipulated to be kept secret.

If for money or other personal profit a voter agree to exert his influence in an election against what he believes to be for the public good, the agreement is void, even though, in the exercise of such influence, he resorts to no unlawful means.

BOOK ACCOUNT. The auditor found that the account presented by the plaintiff against the defendant, amounting to one hundred and sixty-five dollars and forty-seven cents, was correct, and that the plaintiff was entitled to recover that sum unless his claim was in law satisfied by the following facts :

In 1854 the plaintiff was a candidate for the office of town representative in Westford, where both the parties resided. While such candidate, and a short time before the election, there being another candidate for such office, the plaintiff solicited the defendant to use his influence in favor of the plaintiff's election. The defendant replied, in substance, that he had generally voted for the candidate of the opposite party to that to which the plaintiff belonged, and that he had a little choice in the candidates. The defendant then said to the plaintiff that he, the defendant, was owing him an unsettled account, and proposed to the plaintiff to pass receipts, and that then they would talk about a bargain ; the plaintiff made some evasive reply, and said " no matter about the account, let the account go," and again requested him to use his influence for the plaintiff's election. The defendant again alluded to the account, saying he ought to pay the

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account, but that he was poor, or words to that effect, to which the plaintiff, in substance replied, that he cared nothing about the account any way, that it was of no consequence. The result of the whole conversation was that it was mutually understood that the defendant should go on and use his influence in favor of the plaintiff's election to said office, and do what he could for that purpose, and that if the plaintiff was elected, the accounts between the parties should be square or even, or, in effect, that that should be a satisfaction of the plaintiff's claim, referring to the claim now in suit. Thereupon on that occasion the plaintiff handed to the defendant ten dollars, and told him to use it to the best advantage, but gave him no further directions what to do with it, except that he named one man, who, he said, belonged to his party, and was friendly to his election, but for several years had refused to attend the election unless he was paid a dollar, and the plaintiff told the defendant to give him a dollar. At this time the defendant was poor, and the plaintiff did not consider the account against him of much value. The defendant did go on and use his influence from that time in favor of the election of the plaintiff as such town representative until after the election, and did what he could for that purpose. Nothing was said between the parties about the defendant's voting for the plaintiff, except what is to be inferred from what is already stated, but the defendant did at such election vote for the plaintiff for such office, and would not have done so, or favored his election, but for the arrangement and understanding between the parties above stated.

The evidence on the part of the defendant tended to show that on the afternoon or evening of the election, and after the plaintiff was elected, the defendant met the plaintiff and asked him how business stood, and that the plaintiff replied, "all right, your books are balanced and we are all square;" but the evidence on the part of the plaintiff contradicted this, and the auditor reported that there was no such balance of proof, as to this, to warrant him in finding that any such conversation took place.

Upon these facts the county court, at the September Term, 1859,—BENNETT, J., presiding,—rendered judgment for the plaintiff for the amount of his account, to which the defendant excepted.

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Wm. G. Shaw and L. F. Wilbur, for the defendant.

J. French and L. E. Chittenden, for the plaintiff.

ALDIS, J. The auditor's report states the following facts :

The defendant owed the plaintiff about one hundred and fifty dollars. The plaintiff, in September, 1854, was a candidate for town representative of Westford. The defendant had usually voted for the party opposed to the plaintiff. They made this agreement : the defendant should use his influence for the plaintiff's election, and do what he could for that purpose, and if the plaintiff was elected, that should be a satisfaction of the debt which the defendant owed the plaintiff. Nothing was said about the defendant's voting for the plaintiff except what may be inferred from what is above stated ; but he did vote for him, and would not have done so and would not have favored his election, but for the agreement.

I. It is urged by the defendant that the court cannot presume from the above statement that the agreement was that he should vote for the plaintiff, because it is not *expressly* found. In construing the reports of auditors we are to give them a reasonable interpretation, and are to presume or find all facts which reasonably, directly and naturally flow from the facts stated. The defendant agreed "to do what he could for the plaintiff's election." He was a voter and *could* vote for him, and clearly that was what the agreement bound him to do. Any other construction of the report would be absurd. It was, therefore, an agreement for the sale of his vote.

It is not claimed but that such an agreement is immoral and void. It is only claimed that they did not in express words *say* that the defendant should vote for the plaintiff. Although nothing was said about the defendant's vote, yet the meaning was unmistakable. Men who enter into corrupt bargains are not to be expected to speak out in plain language the name of the criminal act which they are about to commit. The consciousness of guilt and the deformity of naked crime lead men to cover up foul deeds with fair words and vague expressions. They do not seem so bad to themselves as they would if they spoke of their crimi-

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nal acts in the outright plain language of honesty and of the law.

II. The bargain was not only the sale of the defendant's vote, but also of his influence and exertions against his convictions and opinions. The defendant generally voted for the candidate of the other party, and but for this agreement, would not have voted for the plaintiff nor favored his election. This also was immoral and against public policy. Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty. If for money or other personal profit, he agrees to exert his influence against what he believes to be for the public good, he is corrupt, and the agreement void, even though in the actual exercise of his influence against his conscience he resorts to no unlawful means. Such bargains cannot be enforced in law. And the reason why they cannot be enforced is, not merely because they are made criminal acts by statute, or are opposed to the provisions of the constitution, but because of their own inherent turpitude, because they are corrupt and corrupting, because they are destructive to public virtue and the welfare of the community. In republican governments especially, whatever tends to destroy the purity of elections should be guarded against with the strictest watchfulness, and pursued with the most prompt condemnation by courts and legislators.

The agreement in this case seems to combine many of the worst elements of political corruption. It was for pecuniary profit. It was for the sale of his own vote. It was for the sale of his influence against his convictions of duty. His pay was made to depend on the result of the election, thus stimulating him to activity and fraud by a pecuniary interest in the result.

III. It is objected that the parties did not agree to keep it secret, and that secrecy is one badge of corruption, and it is sought to bring this within that class of cases in which agents are employed before legislative bodies to further private acts of incorporation, and in which attorneys openly known are allowed, but in which the secrecy of the agency is held to be conclusive proof of the illegality of the agreement. But this is not of that class. The most frank avowal of this trade could not have made it lawful. Unquestionably secrecy was indispensable to success,

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and no express agreement therefor need be proved, but it ought to be and will be presumed as the natural consequence of the agreement.

There can be no doubt that such a contract is void. For how much less than this a contract in consideration of money to promote an election would be held illegal, and under what circumstances, if any, it could be sustained we are not now called on to decide.

If men will enter into such transactions they must be sure to have their price paid them in hand. It may tend somewhat to check corruption that such matters cannot safely rest in promises or be enforced by law, but that at least the unscrupulous politician must advance the pay to the venal voter.

In the case of *Lord Howden v. Simpson*, 10 Adol. and Ellis 793, it was held that no agreement was alleged in the plea that the plaintiff's vote should be given or withheld upon the bill, and that he was left free to exercise his judgment and vote according to his conscience. Ch. J. TINDAL expressly says that if there had been such an averment in the plea, the deed would have been corrupt, illegal and void. But we are not prepared to assent to the remark of that eminent judge, that the tendency and effect of such a contract upon the plaintiff's vote could not be taken into consideration. The cases of *The Vauxhall Bridge Co. v. The Earl of Spencer*, 4 Cond. Eng. Chy. 28, and of *Edwards v. The Grand Junction R. R. Co.*, 7 Simons 337, and S. C. 1 Mylne & Craig 650, have no application to this case. They only show that agreements between corporations as to compensation for injury to their private interests, made to prevent opposition to acts of incorporation, are not against public policy.

IV. The contract was not an executed one. It was to depend on the result of the election. The plaintiff was not bound to discharge the debt unless elected. The discharge, therefore, after the election still remained to be done, for the contract could not execute itself.

The defendant introduced testimony tending to show that after the election the plaintiff verbally discharged the debt, but the auditor does not so find the fact.

Judgment affirmed.

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HENRY B. STACY v. THE VERMONT CENTRAL RAILROAD
COMPANY.

The supreme court will not revise a former decision made by the same court, in the same cause, upon substantially the same state of facts.

When one enters upon the land of another under an agreement of purchase which he subsequently fails to carry out, the owner cannot maintain an action of assumpsit for use and occupation against him. To sustain that action the relation of landlord and tenant must have existed between the parties, evidenced either by an express or implied contract, creating that relation.

DEBT upon an award by commissioners of the damages sustained by the plaintiff on account of his land being taken by the defendants for the use of their railroad. The declaration also contained a general count for the use and occupation of the plaintiff's premises by the defendants. Plea the general issue and trial by jury, at the September Term, 1858, BENNETT, J., presiding.

This cause was before the supreme court at the December Term, 1854, and is reported in the 27th Vermont Reports, page 39, and all the facts in any wise material to the view of the case, taken by this court at the present trial, are there stated.

The county court directed a verdict for the defendants to which the plaintiff excepted.

William Weston and Jacob Maeck, for the plaintiff.

George F. Edmunds and Roberts & Chittenden for the defendants.

PIERPOINT, J. This cause was before this court on exceptions, and was heard at the December Term, 1854. Many of the questions raised upon this hearing were then discussed and decided.

It is insisted that the facts as detailed in the bill of exceptions now before us, are so materially different from those presented for the consideration of the court on the former trial, as to require the application of different rules of law from those established and applied to the case upon that occasion.

Upon carefully examining the original bill of exceptions that

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was then before the court, and comparing it with the one now before us, we are wholly unable to discover in this case any fact material to its determination that was not contained in that. The facts are stated with more particularity now than then, but substantially they are the same. We find no such alteration of, or addition to, the facts, as calls for the application of any different rules of law from what the case then required.

The question then is, will this court revise a former decision made by the same court in the same cause and on substantially the same state of facts?

Such a decision presses itself upon the consideration of the court with a two fold force; first, as an authority, as though it was a decision made in any other case; second, as an adjudication between the parties; not as one that is conclusive as a matter of law, for the court may revise and reverse it, but as an adjudication that practically is to be regarded as having much the same effect.

The rule has been long established in this State, often declared from the bench, and we believe uniformly adhered to, that in the same cause this court will not reverse or revise their former decisions.

It is urged, and there is force in the argument, that if there is error in the decision, and it is ever to be reversed, it should be done in the same court. Although this position may be sound in theory, as applicable to a single case, yet as a rule to be acted upon in all cases, it would lead to incalculable mischief. If all questions that have ever been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end to their litigation until the ability of the parties or the ingenuity of their counsel were exhausted.

A rule that has been so long established and acted upon, and that is so important to the practical administration of justice in our courts, we think should not be departed from. And whatever views the different members of this court may entertain as to the soundness of the former decision, we all agree that the doctrine there enunciated is to be regarded as the law of this case.

It is further insisted on the part of the plaintiff that if he is not entitled to recover the amount of the award, still he is enti-

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tled to recover on the count in his declaration, for the use and occupation of the premises, while the defendants were in possession.

The authorities all agree that to enable a party to recover in this form of action, it must appear that the relation of landlord and tenant existed between them, as evidenced by either an express or an implied contract creating that relation.

The law will imply this relation from the occupancy of premises with the assent of the owner, but this implication may be rebutted by proof of a contract, or of any other fact that is inconsistent with the existence of that relation. If a contract is proved, the rights of the parties are to be determined by the terms thereof, and while the contract is in force and the parties are acting under it, the law will not imply a relation at variance with it.

Under the state of facts proved to exist in this case, can it be said that such a relation existed between the plaintiff and defendants as will enable the plaintiff to recover for the use and occupation of the premises in question, while the defendants were in possession? We have all felt a desire to answer this question in the affirmative if it could be done consistently with the well established rules of law applicable to the subject, for it cannot be denied that the plaintiff has sustained an injury at the hands of the defendants, for which he should recover compensation.

The evidence introduced by the plaintiff negatives the idea that at the time the defendants entered upon the premises in question, it was done under any agreement or expectation on the part of either that the defendant was to become the tenant of the plaintiff, or that any claim for the use and occupation of the land was to arise out of the arrangement that they entered into.

At the time the defendant took possession and commenced work, with the assent of the plaintiff, it was with the expectation on the part of both that the defendant was to take the land as the owner thereof, and under an agreement that the defendant would take the necessary steps to have the property appraised and the title perfected, according to the requirements of the charter of of the company.

The principle seems to be well established that when one enters

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into the possession of another, under an agreement of purchase, which he subsequently fails to carry out, the owner cannot maintain an action against him for use and occupation; the agreement does not create the necessary relation between them, and the law will not imply it in opposition to such agreement.

What would have been the effect upon this question if, on the failure of the defendant to have the land appraised, and pay the damage early in the spring of 1847, according to the agreement, the plaintiff had rescinded the agreement and claimed to hold the defendant as his tenant, or as liable to him for the use of the premises, or as a trespasser, it is not necessary for us now to determine.

The plaintiff did not attempt to rescind the agreement, but allowed the defendant to occupy the premises in question under the agreement, until the appraisal was made, and is now in this suit seeking to enforce the award, on the ground that by virtue of the agreement and the award, the defendant acquired a title to the land and became liable to pay for it. The plaintiff now claims that the defendants became the owners of the premises, and that their possession was as that of owners and not as his tenants.

In the face of these facts, it is impossible that the law should imply the existence of any such relation between the parties as is necessary to enable the plaintiff to recover for the use and occupation of the premises.

Judgment affirmed.

EDWIN D. MASON v. JOSEPH WHIPPLE AND ROBERT RUSSELL.

Attachment. Receipt.

M., an authorized person, attached upon a writ in favor of G. against B. the latter's cord wood, by leaving a copy of the writ in the town clerk's office, and subsequently took the defendants' receipt for the wood, which was disposed of by them for B's benefit. After the attachment by M., but before this receipt was executed, G., as deputy sheriff, attached the same cord wood

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in the same manner upon a writ against B. in favor of another person. The suit of G. v. B. resulted in a judgment for G., and the execution thereon was placed in M's hands for collection in season to charge the property attached. *Held*, that such attachment by G. did not discharge the defendants' liability on their receipt to M.

TROVER for a quantity of cord wood. Plea the general issue and trial by the court at the March Term, 1859,—BENNETT, J., presiding.

Upon the evidence the court found the following facts :

In September, 1851, Rolla Gleason was a deputy sheriff of Chittenden county, and as such, on the 17th of that month received for service a writ of attachment in regular form in favor of the National Life Insurance Company against William P. Briggs and the defendants in this cause, declaring upon a promissory note, upon which the present defendants were sureties for Briggs. The fact that they were such sureties was known to Gleason, and the defendant, Whipple, on the 20th of September, requested him to serve the writ and attach Briggs' property, so that they might be secured from further liability on his behalf.

Gleason afterwards procured a writ of attachment to be issued in his own favor against Briggs, and to be directed to the plaintiff, as an authorized person, for service, and on the 22d of September placed it in the plaintiff's hands for service, and the plaintiff served it by attaching, among other property, all the cord wood on Briggs' farm in Jericho. This attachment was made by leaving a copy of the writ in the town clerk's office in Jericho.

After this attachment was made, and not before, Gleason served the writ in favor of the Life Insurance Company against Briggs and the defendants, by attaching in the same manner the same wood attached by Mason, together with other property.

No actual possession of the wood was ever taken either by Gleason or the plaintiff, but on the 15th of January, 1852, the defendants executed to the plaintiff a receipt for three hundred and sixty cords of wood, valued at eighty-three cents per cord, and described therein as attached by the plaintiff in the suit of *Gleason v. Briggs*. In the receipt the defendants promised to deliver the wood to Mason, or the bearer of the receipt, on demand. The attachment of the wood by Gleason in the suit in

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favor of the National Life Insurance Company was also mentioned in this receipt.

The two suits of *Gleason v. Briggs*, and the *National Life Insurance Company v. Briggs, Whipple and Russell*, were duly prosecuted to final judgment for the plaintiff in each case, and executions issued therein. In the former suit the execution was directed to the plaintiff as an authorized person to serve and return, and was placed in his hands for collection within thirty days after the rendition of the judgment, and within that time he demanded the wood of the defendants upon their receipt, and they neglected to deliver it, and the execution had not been paid.

The defendants were obliged to pay the judgment in favor of the Life Insurance Company against Briggs and themselves, and by the consent of Briggs, obtained before the commencement of this suit, they sold the wood in question.

Upon these facts the county court rendered judgment for the plaintiff for the value of the wood as specified in the receipt, with interest from the date of the demand on the defendants, the amount of such judgment being less than that of the execution in favor of Gleason and against Briggs, to which judgment the defendants excepted.

Roberts & Chittenden, for the defendants.

Hard & French, for the plaintiff.

BARRETT, J. The attachment made by Mason of the property in question was legal and valid. Some five months afterwards, the defendants gave him a receipt for said property, and as is to be inferred, took it into their possession. By virtue of that attachment Mason was entitled to take and hold the actual custody of the property. In the contemplation of the law it was in his custody and possession from the time of the attachment. By so attaching the property, he assumed a relation of accountability for it, in the first instance, both to the creditor and the debtor in the writ, and that accountability would continue till discharged, either by the act of the parties or as the result of a sale and application of the property pursuant to the provisions of

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the law. While that accountability should continue he was entitled to possess, control and dispose of the property in fulfillment of his duties to the parties. It appears, as is claimed, that as to Mr. Briggs, such accountability had ceased before this suit was brought. Had it ceased as to Gleason, or has it since ceased? If so, it is in consequence of what he has done in reference to the property since it was attached by Mason. That consists in having, as deputy sheriff, left a copy of a writ in the town clerk's office and making a return on the original, purporting thereby to attach said property in behalf of another person.

Although an attachment of personal property, by leaving a copy in the town clerk's office, vests in the attaching officer the right of possession, still, as between several attachments, made by different officers, it is clear that the lien and right acquired by the prior cannot be affected by the official force, *proprio vigore*, of the subsequent attachment. As against Briggs and all his subsequently attaching creditors, Mason, by his attachment on Gleason's writ, had acquired the right of exclusive possession of the property attached. Under the statute law of the State, as it then was, Gleason, as deputy sheriff, could not, in virtue of his official prerogative, divest Mason either of possession or the right of possession.

In point of fact, Gleason has not assented, by any express claim, nor exercised by any manual act in his own favor, either personally or officially, any possession of the property. Moreover, it appears that the creditor for whom Gleason made said attachment has not so prosecuted his suit and claim as to have fixed on Gleason any official liability resulting from his having made such attachment. Judgment was recovered in that suit March Term, 1852, and the present defendants paid it without any steps being taken to charge said property in execution, and thereupon they sold and disposed of the wood, being the property in question.

The receipt given by the defendants to Mason, recognizes the attachment that Gleason had made as deputy sheriff.

Gleason's suit against Briggs was duly prosecuted to final judgment, and execution was taken out and placed in Mason's hands, as an authorized officer, seasonably to charge the property, and Mason, as such officer, made demand thereof seasonably.

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bly to fix whatever liability the defendants might be under by virtue of said receipt.

As before stated, the right of Mason to the possession of the property under the attachment made by him, was not supplanted by the *official* force of the attachment made by Gleason, as deputy sheriff, on the National Life Insurance Company's writ. It therefore remains to inquire whether Gleason has done anything in his personal as distinguished from his official character and right, that absolved Mason from his official duty to retain his possession of, and to respond for the property attached by him on Gleason's writ.

We are unable to see wherein he has so done. Every feature of the case seems to indicate the reverse. His withholding the service of the writ in his hands till he had procured the writ in his own favor and caused it to be served, his refraining to take possession of the property, or in any way manually to interfere with it, his taking out execution and delivering it to Mason, for the purpose of charging the property thereupon, clearly show his continued purpose to stand upon a right acquired by virtue of the attachment made by Mason. The course pursued by Mason in taking the receipt and consenting to be authorized in the execution, and taking the proper steps to charge the property and to charge the defendants as receiptors, shows that he regarded himself in no way absolved from his rights and duties, as the attaching officer, by what Gleason had done. The course taken by the defendants themselves seems to have been adopted in the same view. In giving their receipt for the property to Mason in January, 1852, and therein specially recognizing the attachment that Gleason had made as deputy sheriff, and subsequently paying the judgment obtained under said attachment without taking any steps to charge said attached property in execution upon said judgment, and finally selling the property thus receipted, they put it beyond Gleason's power to make the attachment by him as deputy sheriff operative upon the property itself, and at the same time relieved him from any duty to do so.

We fully recognize the authority of the cases cited in the Massachusetts Reports. They but affirm and apply a well settled elementary principle as to the effect of a resumption of property

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by the bailor or pledgor upon his claim of right in respect thereto as against the bailee or pledgee. There have been several decisions in this State of a similar character. It is difficult to apply them in this case, because it does not appear that Gleason has, either officially or personally, interfered with Mason's right and duty to hold possession of the property under the attachment made by him. Hence, in our opinion, Mason is to be regarded as still standing under that duty, and, of course, upon the correlative right to make the property available by virtue of his attachment of it upon Gleason's writ.

The judgment of the county court is affirmed.

GEORGE W. BECKWITH v. GUY FRISBIE & SONS.*Recovery of money paid under protest. Carrier. Assumpsit.*

If a carrier refuse to deliver goods to the owner without the payment of money which he has no right to demand, and the latter, for the purpose of obtaining his property, pay under protest the sum illegally demanded, he may recover it back.

The defendant, a private carrier, contracted late in the fall to transport by canal boat a cargo of oats for the plaintiff from Burlington to New York. The parties both expected that the boat would reach New York that fall, but owing to the lateness of the season, and without any fault on the part of the defendant, the boat was frozen in the canal, and was obliged to lie there all winter. It was necessary for the safety of the boat and cargo that the oats should be taken from the vessel and stored during the winter, and the defendant accordingly procured this to be done. At the opening of navigation in the spring the oats were reloaded and the cargo was delivered at New York; *Held*, that the defendant was entitled to recover of the plaintiff the expense of unloading and storing the oats during the winter.

ASSUMPSIT for money paid. **Plea**, the general issue. The case was referred and the referee reported the following facts:

The defendants, during the year 1856, and previous to that time, were manufacturers of lime at Willsborough, on Lake Champlain, in the State of New York, and were in the habit of

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transporting it to the city of New York for sale, and for that purpose owned and used two canal boats, which carried their lime from Lake Champlain through the canal to the Hudson river, and thence to New York, without unloading. Occasionally the defendants had transported freight in small quantities for other persons on their return trip from New York to Willsborough.

On the 25th of November, 1856, the defendants contracted with the plaintiff to transport for him from Burlington to New York a cargo of oats on their canal boat "Industry" at six cents per bushel, and the cargo was accordingly loaded immediately, and the boat left for New York on the 27th of November. At the time this contract was made the defendants expressed doubts whether the boat would not be prevented by ice from getting through to New York that fall, but the plaintiff said he thought there would be no difficulty in that respect. Immediately after the cargo was loaded the plaintiff paid the captain of the boat, one Reynolds, seventy-five dollars on account of freight. This payment was made in the presence of one of the defendants, who made no objection thereto.

Captain Reynolds, having started with the boat and cargo, proceeded therewith with all reasonable diligence and dispatch in the prosecution of his voyage, and when he arrived within a few miles of Fort Edward, on the Northern Canal, the weather was so cold that the ice obstructed the boat, so that he was unable to proceed further. He then procured a government boat for cutting ice, and with the assistance of that reached Fort Edward, on the canal, and was unable to proceed further till the next spring, in consequence of the freezing of the water in the canal and the closing of navigation. The captain immediately informed the plaintiff of the closing of navigation, and that the boat and cargo were frozen in at Fort Edward, and that he could go no further, and asked him to direct what should be done with the oats. The plaintiff immediately went to Fort Edward and saw the captain and cargo, and the captain asked him what he should do with the oats, but the plaintiff claimed that the defendants were bound to see the oats through to New York, and declined to direct in the matter, and so informed the captain.

The captain also informed the defendants of the condition of

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the boat and cargo. It was necessary and prudent for the security of the boat, as well as for the safety and security of the cargo, to unload the boat and put the oats into a store house, and it would have been imprudent and unsafe to leave the oats on board the boat until the opening of navigation the next spring. The captain unloaded the boat and put the oats in the store of Taylor & Durkee, at Fort Edward, where they remained until navigation opened the next spring. The defendants paid Taylor & Durkee for so storing the oats, during that winter, the sum of forty-six dollars and ninety-six cents.

While the plaintiff was at Fort Edward, as aforesaid, the captain was in want of money to defray the expenses of the boat, himself and men engaged on the boat, and he then represented this fact to the plaintiff, (neither of the defendants being then there) and requested payment of twenty-five dollars on account of the freight, and the plaintiff paid him that sum on that occasion on account of the freight, and took his receipt therefor. This money the captain used mostly in the necessary expenses of the boat and cargo there, and in paying the fare of the men engaged with him on the boat home, which fare, it appeared, it was usual for the owners of a boat to pay. The captain charged such expenditures to the defendants, and credited them the twenty-five dollars, and in a subsequent settlement between the captain and the defendants, the defendants refused to recognize the twenty-five dollars as a payment to them; and in such settlement it was left unadjusted, the defendants contending that the captain had no right to receive payment for them. There was no express authority shown in the captain to receive payment for the freight. It did appear, however, that when the captain left Burlington with the boat, the defendants told him one of them would be in New York when he arrived there, but if not, they would write him directing him what to do with the freight money.

The referee decided that under these facts and circumstances the payment of the twenty-five dollars was a proper and legal payment to the defendants on account of freight, under the contract.

While the boat was frozen in in the canal, before reaching Fort Edward, and while the captain was waiting for the government boat, as above stated, he fed to the team which drew his boat

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one and a half bushels of the plaintiff's oats, the value of which was seventy-five cents.

Early in the spring of 1857 the parties had an interview, at which the plaintiff told the defendants that if they took the oats to New York he should deduct from the freight there the twenty-five dollars and the seventy-five dollars paid by him to Reynolds, and he also claimed that the defendants should pay Taylor & Durkee's bill for the storage of the oats. The defendants said they should take the oats to New York, and should claim the freight at the contract price, deducting the seventy-five dollars, and that they should not deduct the twenty-five dollars, and should claim what they had to pay Taylor & Durkee for taking in and storing the oats, and that unless the plaintiff paid in New York on that basis they should not deliver the oats there; and the plaintiff told them that if he had to pay on that basis in New York, he should do it under protest, and collect back the items in dispute.

In the spring of 1857, and shortly after this interview, and as early as practicable by navigation, the defendants took the oats at Fort Edward on board their boat and transported them to the city of New York, and notified C. P. Peck there (who was the plaintiff's agent to receive the cargo and settle and pay the freight) of the arrival of the oats. Peck claimed of the defendants delivery of the oats on the payment of the balance of the freight on the terms which the plaintiff claimed in the interview between the plaintiff and the defendants, above stated, specifying the particulars thereof; and the defendants refused to deliver them on these terms, but offered to deliver them on payment agreeably to the terms they had claimed in their interview with the plaintiff, and they also told Peck that unless he complied with these terms they should not deliver the oats. After communicating with the plaintiff by mail, Peck informed the defendants he had received directions from the plaintiff to settle on their terms, but to do it under protest, and he accordingly did so. At this time the price of oats was falling in the market.

On trial the plaintiff claimed to recover the twenty-five dollars paid Capt. Reynolds, the amount of Taylor & Durkee's bill, and the seventy-five cents, being the value of the oats fed to the canal boat horses by Capt. Reynolds. The defendants claimed that

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the settlement in New York was correct, and according to the legal rights of the parties, and that whether so or not, it was a bar to any recovery by the plaintiff.

Upon this report, the county court, at the March Term, 1859, —BENNETT, J., presiding,—rendered judgment for the plaintiff for the amount of his claim, to which the defendants excepted.

Geo. F. Edmunds, for the defendants.

E. R. Hard and *J. French*, for the plaintiff.

ALDIS, J. The plaintiff paid the money which he now seeks to recover back, in order to obtain possession of his oats, which the defendants had, and which they refused to deliver up unless the money which they claimed for freight was paid.

The plaintiff claims that the defendants had no right to demand the money which he paid, and that he was under a necessity to pay it to get his goods. From the report of the referee it is obvious that there was a pressing necessity upon the plaintiff to get possession of his oats, in order to sell them. They were in market, their price was falling, and delay involved a loss far greater than the sum alleged to be illegally demanded. He could not wait to settle his rights by law. By payment under protest he sought to avoid what otherwise would have been inevitable loss. Was payment under such circumstances voluntary or compulsory, and can the sum paid be recovered back?

It was decided in the early case of *Asley v. Reynolds*, 2 Strange 915, that money unjustly demanded by a pawnbroker for the redemption of plate, and paid by necessity and in order to obtain possession of the plate by the owner, could be recovered back. It was held to be a payment by compulsion. The court said "the plaintiff might have such an immediate want of his goods that the action of trover would not do his business. When the rule *volenti non fit injuria* applies, it must be where the party had his freedom of exercising his will, which this man had not." This has been the leading case on the subject, and has often been referred to and approved; see *Smith v. Bromley* 3 Doug. 695, where the doctrine is approved by Lord MANSFIELD; and *Cartwright v. Rowley*, 2 Esp. 722, where it is

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approved as having been applied by Lord KENYON to the payment of money through necessity to the steward of a manor, in order to obtain the production of deeds at a trial, for which the steward had charged extravagantly. In *Shaw v. Woodcock*, 7 B. & C. 73, BAYLEY, J., recognizes the general principle thus: "if a party has in his possession goods or other property belonging to another, and refuses to deliver such property to the other, unless the latter pays him a sum of money which he has no right to receive, and the latter in order to obtain possession of his property pays that sum, the money so paid is a payment by compulsion, and may be recovered back." In *Atlee v. Backhouse*, 3 M. & W. 650, PARKE, Baron, expresses the principle and notices a qualification of it thus: "if my goods have been wrongfully detained and I pay money simply to obtain them again, that being paid under a species of duress may be recovered back again, but if while my goods are in possession of another I make a binding agreement to pay a sum of money and to receive them back, this cannot be avoided on the ground of duress." But in neither of these cases did the precise point now in question arise.

The case of *Skeate v. Beale*, cited by the defendants' counsel, 11 Adol. & E. 983, (39 E. C. L. 294.) was of an agreement in writing to pay rent illegally demanded in order to get possession of the goods distrained. Upon suit brought on the agreement, the plea alleged that the agreement was given to get possession of the property, which the plaintiff threatened to sell, but the pleas disclosed no necessity for giving the agreement, and did not allege it was given under protest. Lord DENMAN held the agreement valid, but noticed the distinction between such an agreement and an actual compulsory payment of money.

In a later case, *Parker v. The G. W. R. Co.*, decided in 1844, 7 Mann. & Grang. 253, (49 E. C. L. 252.) where a suit was brought to recover back tolls illegally demanded by and paid to the defendants as carriers, TINDAL, Ch. J., says, "such payments are not voluntary. The parties were not on an equal footing; the plaintiff was acting under coercion, as the defendants would not perform the service to which the plaintiff was entitled until he made such payments." In a still later case, decided in 1851, 7 Eng. Law & Eq. 528, *Parker v. The Bristol & Exeter Rail-*

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way Co., PARKE, Baron, again laid down the rule as expressed by him in *Atlee v. Backhouse*. He says, "if a man *pays* another money to obtain goods which he has no right to withhold, although duress of goods will not avoid a contract, yet the money so paid may be recovered back and no tender of the smaller sum really due is necessary. The company is bound to know what is a reasonable sum, and charge no more." This was an action to recover back money paid under protest to a railroad company for illegal tolls and fares demanded by them for the carriage of goods.

There are many other decisions in the English courts which it is needless to refer to, as the above sufficiently indicate the preponderance of authority and the established doctrine. Some of the earlier cases which are cited by the defendants do not seem to affect the principle here involved, but rather to turn upon the nature and peculiar application of replevin as a remedy for a wrongful distress of goods. There are others, however, which it is difficult to reconcile with the general current of authority. We have referred to the most important and the most recent decisions, to those which we think show what the law is at this day in England.

Similar decisions have been made in this country. In *Maxwell v. Griswold et al*, 10 How. 243, the plaintiff, to avoid being made liable to a penalty under the revenue laws, paid the duties which the collector demanded, but which were more than the law required and then sued to recover them back. The action was sustained.

Judge WOODBURY says, in speaking of the distinction between voluntary and compulsory payments, "it can hardly be meant in this class of cases that to make a payment involuntary, it should be by actual violence or physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment." See also 10 Pet. 188, *Elliot v. Swartwout*.

In New York, in the recent case of *Harmony v. Bingham*, 2 Kern. 99, the same doctrine is applied to payments, made under protest, of unjust charges by carriers, where the payments were

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necessary to regain possession of the property by the owners. The cases are there very fully examined.

So in Maine; see *Chase v. Dwinell*, 7 Greenl. 134. In our own State there have been no decisions upon the subject, and therefore we have referred more fully than we otherwise should to decisions elsewhere. The principle is, however, stated and recognized in *Center Turnpike Co. v. Smith*, 12 Vt. 218, by Judge REDFIELD, though the decision of the case turned upon another question.

The reason of the rule is obvious. To make the payment a voluntary one the parties should stand upon an equal footing. Then there is the free exercise of will, and compromise or payment is voluntary and binding. But where one has the advantage of the other, where delay or a resort to the law is indifferent to the one, but may produce serious loss and injury to the other, it is unconscionable to press such advantage to the obtaining payment of unjust demands. That is extortion.

The attention of the court has been called to a distinction claimed as existing in these cases which would forbid the application of the rule to the cause at bar, viz: that the authorities cited are those in which the party exacting the money wrongfully has had a lien, or right to *some* sum in payment, and the amount due could not be ascertained with certainty, while here the plaintiff could tell the precise sum due, and should have tendered that. But we do not find this distinction to exist. On the contrary, in many cases the amount due was ascertainable, and the point has been made that the sum really due should have been tendered, and it has been ruled otherwise. When one having some just claim exceeds his right and exacts an unjust claim, he stands then on the same ground of wrong doing as he who makes a wrongful claim without color of right or office. As the payment in New York, therefore, can have no effect to bar the claims of the plaintiff, if just, we proceed to examine them.

II. The claim of twenty-five dollars for money paid the captain towards freight, is resisted on the ground that the captain had no authority to receive it. It is sufficient to say that the evidence as detailed by the auditor tended to prove it, and we must treat the finding of the referee and the allowance of the

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item by the county court as conclusive of the fact that he had the authority.

III. As to the item of seventy-five cents for oats fed by the captain to the team while the boat was waiting for the State boat to break the ice, we think that this was an act within the employment of the servant, and for which the defendants are liable in this action. Whether, if the suit had been *ex delicto* against the defendants, they would have been liable, we do not deem it necessary to inquire.

IV. The next charge allowed by the county court is for forty-six dollars and ninety-six cents, paid for storage and care of the oats at Fort Edward.

The defendants' boat was obstructed by ice at Fort Edward, and could proceed no further till spring. The defendants had used all reasonable diligence and dispatch in proceeding from Burlington to that point, and so far are not chargeable for any fault or neglect.

The safety of the cargo, and of the boat also, required that the oats should be removed and safely stored, and this was done by the captain.

The closing of the canal by ice was an act of Providence which excused the defendants from proceeding further till navigation opened. Thereupon it was their duty to use ordinary care in preserving the property, and this they did. The inquiry now arises, who shall bear the expense of storing the property safely through the winter, the plaintiff or the defendants?

Nothing was said about it in the contract. It was not in their contemplation when the bargain was made, and no provision was made in regard to it. Both expected and intended that the cargo should reach New York that fall, but both knew that the freezing of the canal might prevent it. The price which the plaintiff was to pay the defendants was six cents per bushel, for *freight*, for transporting the cargo to New York. It did not contemplate that the property should be stored during the winter at some point while on the way. Had either party expected this the voyage would not probably have been begun. Had the question been raised when the contract was made, it seems very plain to us that the plaintiff could not reasonably have asked, nor would

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the defendants have agreed, that they should bear the expense of it. It is expense bestowed on the plaintiff's property, and for his benefit; it preserves his property, but does not aid the defendants' interest, which was simply to transport the cargo to New York. We think that equity between these parties requires that this expense should be borne by the plaintiff. And if he was so liable in equity he could not shift the burden on to the defendants by refusing to pay what it was his duty to pay. The law raises an implied promise on his part to pay the defendants for what they might be obliged to expend in preserving his property, when that duty was thrown upon them by their having his property in their care as carriers, and were prevented from completing their contract by an act of Providence. If he has paid it he cannot recover it back.

In this view of the case we regard the defendants as private carriers, and liable only for reasonable diligence. The report states those facts in regard to their business and this particular contract which clearly bring them within the class of private carriers, and so liable only for reasonable diligence. An examination of authorities to establish this point we deem unnecessary.

The judgment of the county court is reversed, and judgment is rendered for the plaintiff for the twenty-five dollars and the seventy-five cents, and interest from the 20th of May, 1857, as stated in the report of the referee. The defendants' costs in this court to be deducted.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF FRANKLIN,
AT THE
JANUARY TERM, 1860.

PRESENT:
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. LUKE P. POLAND,
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. LOYAL C. KELLOGG, }

THE STATE OF VERMONT v. JOHN HUMPHREY.

Criminal law. Larceny.

If one hire a horse of another, under the pretence that he wishes him only for a temporary purpose, when in fact he designs wholly to deprive the owner of him, and he actually does put the horse to a different use from that for which he hired him, it is larceny, even though he do not sell or dispose of the horse.

It seems that the obtaining of the horse under such false pretences, with the design of stealing him, is in itself larceny.

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INFORMATION for stealing a horse. Plea not guilty, and trial by jury at the April Term, 1859, ALDIS, J., presiding.

The prosecution introduced testimony tending to show that the respondent, at about half past nine o'clock in the forenoon, went to a livery stable in Swanton, and hired the horse in question, to go, as he said, to St. Albans with, promising to return by noon; that at this time the respondent intended to steal the horse; that he drove the horse to St. Albans and thence immediately to Shelburn, where he stayed over night, at one Isham's hotel; that the next morning, having no money to pay his hotel bill, and Isham refusing to let him take away the horse without paying it, he went on foot to Vergennes and Middlebury, leaving the horse at Isham's; that on the following day the respondent was arrested, and that he then voluntarily stated that he intended to take the horse to a back town near Whitehall, N. Y., and there sell or exchange him; and that the horse was on the same day retaken by the owner at Isham's hotel in Shelburn.

The counsel for the respondent requested the court to charge the jury that if the respondent hired the horse, and did not *in point of fact* dispose of him, it was not larceny. The court declined so to charge, but told the jury that the respondent at the very time he hired the horse, must have intended to steal him, and that if he did not have such intent at that time, but *after* having hired him, *then* for the first time entertained and formed the idea and intent of stealing him, that would not be larceny; that to constitute larceny the jury must find that *at the time he hired him* he intended to convert the horse permanently to his own use, to keep, or to sell, or exchange him; that if he merely intended to take him for a ride, and then leave him for the owner to get again, that would not be larceny; but that if the respondent, at the time he hired the horse, intended to convert the horse permanently to his own use, and deprive the owner of him entirely, (the other facts in the case being made out,) it would be larceny, although he did not *in point of fact* dispose of the horse. To this part of the charge, and to the refusal of the court to charge as requested, the respondent excepted.

The jury returned a verdict of guilty.

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James S. Burt and *George F. Houghton*, for the respondent.

1. To constitute the crime of larceny the taking of the property must be forcible and against the will of the owner. If the owner voluntarily part with the possession of the property, although he may have been induced to do so by the false representation of the one hiring the property, the taking is not forcible nor against the will of the owner; *Wharton's Am Cr. Law*, sec. 1750; *Felter v. State*, 9 Yerger 397.

2. There must be not only an intention to steal at the time of the hiring, but also an actual conversion of the property afterwards; 2 *Russell on Crimes*, 54-56; *Regina v. Brooks*, 34 Eng. Com. Law, 396.

Wm. W. White, for the prosecution, cited 2 Arch. Crim. Pracs 361 *et seq.*; 3 Greenl., sec. 162; 2 Starkie's Ev. 824 *et seq.*; *Commonwealth v. Jones*, 1 Pick. 375; 2 *Russell on Crimes*, 20, 46, 50, 52, 53; *Cary v. Hotailing*, 1 Hill 311.

POLAND, J. The respondent's counsel claim that, as the horse and wagon came into his possession by the consent of Jennison, the owner, he was not guilty of the crime of larceny, although such consent was obtained by his own false and fraudulent pretence that he wished to hire the same to go to St. Albans merely, when in fact he intended thus to get possession of the property, and then to convert the same to his own use, and wholly deprive the owner of his property. The argument upon this point it founded upon the common definition of larceny, as given in the elementary books, that it is the felonious taking the property of another, *without his consent and against his will*, with intent to convert the same to the use of the taker.

It is said that in this case the taking was not *without the consent and against the will of the owner*, and therefore not a felonious taking.

But as is said by Mr. ARCHBOLD, "this must be understood as meaning merely the absence of all *free and voluntary* consent upon the part of the owner to the party taking his goods and appropriating them to his own use." Where the consent of the owner to the taking has been obtained by fraud and deception by

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inducing him to believe that the taker wishes to obtain the property for an honest and temporary purpose, when in fact the design is to wholly deprive him of it, and where no consent would have been given if the real purpose had been disclosed, this is not regarded as any assent by the owner, and the taking for the purpose and design of the taker is against the will of the owner. A consent thus obtained is wholly nugatory, and the taking may be regarded as tortious, and the taker as a trespasser, both civilly and criminally.

The only authorities cited in support of this view, are *Feller v. State*, 9 Yerger 398, and some cases preceding that in the State of Tennessee. Those cases adopt the reasoning of the respondent's counsel to the fullest extent. But the law is fully established otherwise in England, and so far as we are able to learn, in every State in the Union except Tennessee. It is so laid down by every elementary book on criminal law. It has been repeatedly so held in this State on trials in the county court, and has been regarded as so well settled as to have never before, to our knowledge, been brought before the supreme court. Indeed, in the Tennessee case it is declared to be a doctrine peculiar to that State, and admitted to be against the doctrine of the English courts and the other States. The general current of decision on this subject seems to us also to be founded upon the plainest principles of natural justice and good sense, and we do not think there is any occasion to abandon what has been so long regarded as a fixed rule of law in this State.

2. It is claimed that when the felonious taking is under a pretence of hiring or borrowing the property, the offence is not complete until the taker has converted the property by selling or disposing of it.

This certainly is not necessary in ordinary cases of larceny where possession of the property is obtained without the knowledge or consent of the owner. It is sufficient in such cases to show that the taker has obtained possession of the property and that the property is severed from the possession of the owner. Even when the thief is arrested upon the premises of the owner of the stolen goods, it is held that the offence is complete. This ingredient of the offence certainly is not included within the ordi-

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nary definition of larceny, that only requires a taking, etc., "with intent to convert the same to the use of the taker," not that an actual conversion should be proved. It does not become necessary to decide in the present case whether the offence is complete before the property has been carried beyond, or put to any other use than that contemplated by the pretended and fictitious bailment. We do not see upon principle why it is not, as soon as the possession is obtained from the owner, provided the fraudulent and felonious intent be proved, for that very taking is of itself a conversion.

Practically, however, this becomes unimportant because in all this class of cases the evidence of the subsequent conduct and acts of the party, in making a different use of the property from that contemplated by the pretended hiring, and appropriating the property to his own use, furnishes the evidence that the original intent was felonious, and that the hiring or borrowing was a mere device to obtain the possession from the owner, and an opportunity to steal the property.

We have been referred to notes of decisions in the United States Criminal Digest of *Lewer v. Corwin*, 15 Serg. & Rawle, 93, and *State v. Lindenthall*, 5 Rich. (S. C.) 237, in which it is stated to have been held that when one obtains possession of another's goods by false representations, with the fraudulent intent to convert them to his own use, and *does convert them to his own use*, it is larceny. We have not seen the cases, and do not know how far they warrant the doctrine of the note, that there must be an actual conversion by the fraudulent bailee to constitute the crime of larceny. The notes of these decisions do not seem to support the idea that the conversion must be by a sale of the property.

The facts proved in this case show an actual conversion by the respondent. Even if the hiring had been *bona fide*, and without any fraudulent design, the subsequent driving the horse and wagon from St. Albans to Shelburn, was an actual conversion of the property by the respondent, and trover could have been maintained without any demand and refusal. Those cases therefore do not seem at all to conflict with the ruling of the court below in this case.

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The only case cited which seems to support the view, that there must be an actual disposal of the property in order to constitute the offence, is *Regina v. Brooks*, 8 C. & P. 295, 34 E. C. L., 396. That case is merely a *nisi prius* ruling of the late Ch. J. TINDAL, whose *nisi prius* opinion we concede to be entitled to as much weight as that of any single judge.

In that case the defendant hired a horse and gig in London, to go to Windsor to be gone two days. Instead of going to Windsor he went in the opposite direction to Rumsford, where he offered the horse and gig for sale, but was unable to effect a sale because his appearance and manner excited so much suspicion, and upon such suspicion he was there taken into custody; Ch. J. TINDAL directed an acquittal. The only reason stated by the reporter is as follows: "Here has been no actual conversion of the property, only an offer to sell."

The case seems to be identical almost in its facts with Spencer's case, 1 Lew. 197, before BAYLEY, J. and Armstrong's case, 1 Lew. 195, before HOLROYD, J., in each of which it was submitted to the jury to say if the original design in obtaining the property was to steal it, and if so, it was held that it was larceny.

Mr. GREAVES, the English editor of the recent edition of Russell on Crimes, one of the most eminent of modern crown lawyers, treats the case of *Regina v. Brooks* as erroneous, and as conflicting with the other decisions in the English courts. We are unable to find that that case has been followed either in England or in this country. The reason given that there was no conversion of the property is unfounded, for the driving the horse and gig to another place was clearly a conversion. We feel justified in wholly disregarding the authority of that case, as opposed to both authority and reason.

The result of such a doctrine would be, that when property is thus obtained by a fraudulent device, the taker could never be convicted of larceny so long as he only kept the property for his own use, however effectually he might have deprived the owner of his property. The absurdity of the result is a sufficient answer to the proposition itself.

The exceptions are, therefore, overruled.

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ALVIN HASKIN v. MERRITT RECORD.

Trespass.

The plaintiff, having the right to enter upon certain land belonging to another, upon which was standing both pine and cedar timber, which timber belonged to the plaintiff, sold to the defendant the pine timber and the right to enter upon the land to cut and carry it away. Both parties having entered upon the land to cut and carry away the timber belonging to them respectively, the defendant carried away some of the cedar felled by the plaintiff; *Held*, that the plaintiff could maintain trespass *quare clausum fregit* therefor.

TRESPASS in three counts, the two first *quare clausum fregit*, and the third *de bonis asportatis*. Plea the general issue, with notice of a license from the plaintiff to the defendant, to do the acts complained of. Trial by jury at the September Term, 1859,—ALDIS, J., presiding.

The plaintiff introduced in evidence a deed from Alexis White to Elijah Hungerford and Hollis Hastings, of the *locus in quo*, dated March 23, 1838. This deed conveyed to the grantees the land in question in order that they might take therefrom all the cedar, pine and tamarack timber growing thereon, and provided that when such timber should be removed, the land should revert to the grantor.

The plaintiff also introduced as evidence a contract between Hollis Hastings and himself, by which the former sold the latter all the tamarack, pine and cedar timber on the west half of the piece of land described in the deed from Alexis White to Hastings and Hungerford.

The plaintiff also gave evidence tending to show that he closed this contract with Hastings on the 19th of January, 1855, and that on the next day in the forenoon he entered on the land in question, and began to cut cedar timber, and that while so in possession of the premises the defendant entered thereon and cut and carried away the butts and tops of the cedar trees which the plaintiff had felled. It appeared that Hungerford and the plaintiff had divided between them the timber while standing, the former taking that on the east half and the latter that on the west half of the land.

The defendant gave in evidence in written contract between

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the plaintiff and himself, dated January 19th 1855, by which the former acknowledged the receipt from the latter of seventy-five dollars in full for the pine timber upon the land in question, and agreed to return such money to the defendant if the plaintiff should not be able to close a trade with Hastings, giving him a good title to such pine timber.

The defendant's evidence also tended to show that afterwards on the same day the plaintiff, for a valuable consideration, verbally agreed to sell the defendant all the butts and tops of the cedar timber, then standing on the premises, and which the plaintiff was then expecting to buy of Hastings, with the condition to such verbal contract that it should be of no effect if the plaintiff should fail to buy such timber of Hastings; that the plaintiff closed his expected trade with Hastings on the evening of the 19th of January, and notified the defendant thereof on the next morning; that the pine and cedar timber were scattered indiscriminately over the whole premises; that very soon after the plaintiff had entered upon the premises and had begun to cut the cedar timber for the purpose of using the bodies of the trees, the defendant also entered thereon under his written and his verbal contracts above mentioned, for the purpose of cutting and taking away the pine timber under the former, and the cedar tops and butts under the latter; that in order to cut and draw away such pine and such cedar butts and tops, it was necessary for him to enter upon and occupy, for the time, such premises, and that for that purpose alone he did enter upon and occupy them.

The plaintiff then introduced evidence tending to prove that no such verbal contract, as the defendant claimed in regard to the cedar tops and butts, was made between the parties, but he admitted that he had sold the pine timber to the defendant, and that the latter entered upon the land for the purpose of cutting and carrying such pine timber.

It also appeared that at the time the defendant drew away the cedar tops and butts, he had entered upon the premises and was cutting off the pine under his written contract, and that the plaintiff at the same time was upon the premises cutting and drawing off the bodies of the cedar trees.

The defendant requested the court to charge the jury that the

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plaintiff could not maintain his action upon the two first counts, for breaking and entering the plaintiff's close. The court declined so to charge, but told the jury that although the defendant had the right to enter upon the premises and occupy the same for the purpose of cutting and drawing off the pine, and although at the time of the alleged trespass he was upon the premises engaged in cutting and drawing off the pine, still if they should find that there was no contract between the plaintiff and the defendant as to the cedar butts and tops, and that the defendant had no right to draw them off and that he did draw them off, then the plaintiff could recover for such cedar tops and butts, as well upon the two first counts as upon the third count.

The jury returned a general verdict for the plaintiff. To the refusal of the court to charge as requested, and to the charge as given, as above detailed, the defendant excepted.

J. J. Deavitt and H. R. Beardsley, for the defendant.

— — — — —, for the plaintiff.

PIERPOINT, J. The declaration in this case contains three counts; in the first two the plaintiff declares upon a trespass "*quare clausum*," and in the third, on a trespass "*de bonis*."

The court charged the jury that upon the facts as stated in the bill of exceptions, if found to be true, the plaintiff was entitled to recover on either of the counts.

The defendant insists that the charge was erroneous. He concedes that upon the facts found, the plaintiff was entitled to recover on the third count, but denies that trespass *qu. cl.* can be maintained, and that as the verdict is general, a new trial for that reason must be awarded.

In support of this position, it is claimed that the plaintiff and the defendant were the joint and common possessors of the premises on which the property in question was situated; that they were tenants in common of the possession, having a joint and equal right to enter upon each and every part of the premises on which the timber was situated, and that being such tenants in

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common, an action of trespass *qu. cl.* cannot be maintained by the plaintiff for the injury complained of.

The general principle seems to be well settled, that one tenant in common cannot maintain trespass *qu. cl.* for an entry upon, or a mere injury to the common property; and if the relation existing between the plaintiff and the defendant at the time of the act complained of, was such as is contended for, the objection to the charge of the court would seem to be well taken.

But we think these parties cannot be regarded in any sense as tenants in common, or as having any joint interest or right in the realty or in the timber. The rights of each were entirely separate and distinct from those of the other. The plaintiff having the right to all the timber upon the premises except the pine, with the right to enter and remove it, and having entered for the purpose of removing it, is to be regarded as in the possession of the premises for all purposes, and to the extent, necessary to enable him to accomplish it and no further. Beyond this he has no interest in the premises and no right to the possession, but to this extent his right and his possession are exclusive, both as to the defendant and the owner of the soil, and if either were to enter upon the premises, and do any act in violation of these rights, the plaintiff would have his remedy by an action of trespass *qu. cl.* So, too, of the defendant, he is the owner of the pine timber with the right to enter and remove it. The case shows him to be in possession of the premises for the purpose of removing the pine at the same time that the plaintiff is in possession for the purpose of removing the other timber. Their possession is like their interest, not joint, but separate, and limited by the extent of their interest, and the possession of both does not constitute the entire possession, for except for the purpose of removing the timber the owner of the soil is to be regarded as in the possession, and for any injury to the freehold, not affecting the rights of the plaintiff or the defendant, in this suit, the owner of the soil could maintain the action of trespass *qu. cl.*

In this case, therefore, when the defendant, being in possession for the purpose of removing the pine timber, goes further and takes the cedar timber belonging to the plaintiff, and for the

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removal of which he is in possession, as the exceptions show, such act of the defendant is not only a violation of the plaintiff's right of property, but is a violation of his possession; and this cannot be affected by the fact that the defendant has the right to go to all parts of the premises where the pine timber is to be found to remove it. As it is only to that extent that he is to be regarded as in possession, when he goes beyond this, as he must in all cases where he attempts to take the other timber, he becomes a trespasser on the possession of the plaintiff; he goes where he has no right to go, and where he has no possession, his possession being limited by his right.

We think the acts of the defendant were such that the plaintiff was entitled to his action of trespass *qu. cl.* therefor, and that there was no error in the charge of the court.

But if it was not so, it is not easy to see how the defendant could have sustained any injury thereby, it being conceded that the plaintiff, under the finding of the jury, was entitled to a verdict upon the third count, and as the plaintiff claimed to recover nothing but what he would have been entitled to recover under that count, it would seem that the verdict must have been the same if the charge had been in this respect as requested by the defendant, but under the view which we have already taken of the case, this consideration becomes unimportant.

The judgment of the county court is affirmed.

AZARIAH LAZELL v. GEORGE F. HOUGHTON.

Reference. Evidence.

.. An enlargement of a rule of reference, issued by a justice of the peace in conformity with the 63d sec., chap. XXIX., Comp. Stat., p. 237, cannot be made by the referee, but only by the justice himself with the consent of the parties; and unless the report of the referee is made pursuant to the rule of reference, as originally issued, or regularly enlarged, no judgment can be rendered on it.

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The mere statement in the referee's report of the enlargement of such a rule of reference is not sufficient evidence that it was regularly enlarged. A record or certificate from the justice to that effect is requisite.

The facts in this case are sufficiently stated in the opinion of the court. The county court, at the April Term, 1859,—ALDIS, J., presiding,—rendered judgment for the plaintiff for the amount reported by the referee as due him, to which the defendant excepted.

The defendant *pro se*, with whom was J. S. Burt.

Peake & Rugg, for the plaintiff.

KELLOGG, J. The questions presented in this case arise upon a certain rule of reference issued, on the application of the parties, by Alfred Forbes, a justice of the peace of the county of Franklin, and the report thereon made by the referee. From the application made by the parties to the justice to issue the rule of reference, which was in writing and accompanies the referee's report, it appears that on the 14th day of June, 1858, a suit at law was pending before said justice in favor of Lazell as plaintiff against Houghton as defendant, and that on the same day the parties made application to said justice to issue a rule that the subject matter of the said suit be referred agreeably to the statute to Valentine S. Ferris, of Swanton, in said county, as referee, he having been mutually agreed upon as such referee by said parties. The said justice thereupon issued his rule of reference agreeably to the application, and substantially in the form prescribed by the statute; (Comp. Stat., p. 618, form 27) The rule of reference was dated on the same 14th day of June, 1858, and required the report of the referee to be made in writing, and if the matters in demand should not exceed forty dollars, to be returned to the said justice at a place named, in said Swanton, on the 7th day of August, 1858, at ten o'clock in the forenoon, to which time and place the court of the said justice stood adjourned for the purpose of receiving such report and rendering judgment thereon; but if the matters in demand should exceed forty dollars, the rule in that case required the said report to be returned

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to the county court then, "next to be held at St. Albans, within and for the county of Franklin, on the second Tuesday of September, A. D. 1858."

It appears from the report that the referee was attended by the parties, on due notice of the time and place of hearing, on the 5th day of August, 1858, and that "by the agreement of the parties, the" (hearing of the) "cause was continued until the 10th day of September" (then) "next," at an hour and place named, "and the rule enlarged;" and that, at the last mentioned time and place, "the parties again with their counsel appeared, and the cause, by request of said Houghton, the defendant, was again continued to the 18th day of November, 1858," on certain terms, and, "the rule was then enlarged;" and that, at the time to which the cause was so continued as last mentioned, the parties again appeared with their counsel, the plaintiff submitted his account against the defendant, the parties introduced their respective proofs, a full hearing was held in the matter so submitted, and the said referee, at the then next term of the county court within and for the county of Franklin, which was held on the second Tuesday of April, A. D. 1859, returned his special report thereon in favor of the plaintiff. On the filing of said report in the county court, the defendant filed his objection to the acceptance of the same, but the report was accepted, and judgment was rendered thereon by the county court, in favor of the plaintiff against the defendant for the amount allowed by the referee, with the costs before the referee, and also the costs before the justice, amounting in the whole to fifty dollars and ninety-seven cents, together with the costs in the county court. The defendant excepted to the decision of the county court in accepting the report and allowing costs.

One of the objections of the defendant to the acceptance of the report of the referee was that the referee did not conform to the rule of reference as to the time, place and manner of making his report, and this objection being equivalent to a denial of the regularity or legality of the proceedings of the referee and also of the subsequent action of the county court, is in the nature of a plea to the jurisdiction assumed in this case, and ought therefore to be first considered. The statute (Comp. Stat., p. 237, sec. 65

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to 67,) provides that "the referee shall conform to the rule of reference as to the time, place and manner of making his report, and that the report of the referee, *when made pursuant to such rule*, and returned to such county court or justice, shall be final and conclusive between the parties in the matter submitted, and judgment may be rendered by such court or justice, and execution issued thereon, including costs, for the party recovering." The statute contemplates a judicial proceeding, upon which a judgment is to be rendered. It is apparent, on referring to the rule of reference issued by the justice in this case, that the power of the referee to make and return his report was limited to the 7th day of August, A. D. 1858, in case it was to be returned to the justice, and to the then next term of the county court of the county of Franklin, then next to be held on the second Tuesday of September, 1858, in case it was to be returned to the county court. A submission to a reference is always the voluntary act of the parties, and the rule of reference when made, determines the extent of the powers of the referees. "Every enlargement of the rule is in effect a new reference, and requires the same assent of the parties as is required to make the submission in the first instance;" *Rice v. Clark*, 8 Vt. 104, per WILLIAMS, Ch. J. The rule of reference in this case implies, by necessary intendment, that the hearing before the referee should have been held on or before the 7th day of August, 1858, that being the day to which the justice's court stood adjourned for the purpose of receiving his report, and that in case of making the report to the county court, it should have been made at the September term next following; but it appears from the referee's report that the hearing before him was not had until the 18th day of November, 1858, and it also appears that the report which was made to the county court, was not made until the then next term thereof, which was begun and held on the second Tuesday of April next following. The report of the referee contains a statement that on each of the two occasions when the hearing before him was continued, the rule of reference was enlarged, and that the first of said continuances was upon the agreement of the parties, and the other upon the motion of the defendant; but there is no evidence in the case, except this statement of the referee, to show that the rule

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of reference was at any time enlarged. It is claimed on the part of the plaintiff, not only that the rule of reference was properly enlarged, so as to authorize the subsequent proceedings of the referee, but that the referee's statement of that fact in his report is the proper evidence to establish the fact. As the consent of the parties and the action of the justice thereon were each essential to the making of the rule of reference originally, so, in our judgment, any enlargement of the rule would necessarily require some action on the part of the justice, as well as the consent of the parties. An arbitration would require nothing more than the consent of the parties uniting in the submission, but there is a well defined distinction between a mere arbitration and a reference under the statute, which is a judicial proceeding. The referee could not extend or enlarge his own authority any more than he could create it originally, and the evidence that the rule of reference was properly enlarged ought, as we think, to appear independently of any statement contained in his report, and should accompany the report when it is returned. The power of the referee is derived from a rule of reference properly issued, and as every enlargement of the rule is in effect a new reference, it should be authenticated by a record or certificate to be made by the justice who issued the rule in the first instance. There is no such record or certificate of the enlargement of the rule in this case. The rule of reference is the foundation for the report and subsequent proceedings, and the authority and power of the referee is to be looked for in the rule and not in his report. A judgment can be rendered on the report of a referee only when it appears that the report was made pursuant to the rule of reference. In this case, there is no proper evidence that the rule of reference was enlarged, and although the acquiescence of the defendant in the proceedings before the referee would not entitle this objection to favor as coming from him, yet we regard the objection as being well founded, and our judgment must be controlled by its legal effect. We cannot convert a mere arbitration into a judicial proceeding. The proceeding in a reference with knowledge that the time for making the report has not been duly enlarged, may be evidence of a parol submission on the terms of the original submission, and the award in such case may be good,

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although it could not be enforced by a judgment ; but in that case the referee would become a mere arbitrator, and his power would be derived wholly from the consent of the parties ; *Reade v. Dutton*, 2 Mees. & W. 69 ; *Hallett v. Hallett*. 5 Mees. & W. 25 ; 2 Archb. Pr. (9th Ed.) 1555.

The conclusions to which we have been led upon this objection render the consideration of other objections to the allowance of this report entirely unnecessary. The judgment of the county court accepting the report is reversed, and judgment is to be entered that the proceedings be dismissed, and that the defendant Houghton be allowed his costs in the county court and also in this court.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF GRAND ISLE,
AT THE
JANUARY TERM, 1860.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. LUKE P. POLAND,
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. LOYAL C. KELLOGG, }

JOHN BACON v. THOMAS MCBRIDE.

Inheritance.

Illegitimate children do not inherit from legitimate children of the same mother.

EJECTMENT for a tract of land in South Hero. Plea the general issue, and trial by the court at the August Term, 1859,—ALDIS, J., presiding.

It appeared that Albert Bunnell, senior, died in the year 1809,

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seized and possessed of the land in question; that he left a widow and three children, Polly, Matilda and Albert, who were also the children of his widow; that the land in question was set out as dower to his widow, Sally Bunnell, and that the reversion therein under the laws then in force, descended to his children in the following proportions, viz: to Albert, Jr., one-half, and to his sisters one-quarter each; that in 1822 Albert, Jr., died, a minor without issue, and that his interest in the reversion of said land descended in equal shares to his mother and two sisters, Polly and Matilda, unless the illegitimate children of his mother hereinafter mentioned were entitled to inherit his property in equal proportions with his legitimate sisters; that Sally Bunnell, the mother of Albert, Jr., after her husband's decease, and before the death of Albert, Jr., had two illegitimate children, who were living at the time of trial; that Sally Bunnell occupied said land up to her death in 1854; that she executed a deed of the premises in question dated 12th of September, 1851, to Darwin Adams, one of her illegitimate children, and that Darwin Adams conveyed the same premises to the defendant by deed dated March 26th, 1856, since which time the defendant had been in possession; that Polly Bunnell conveyed to the plaintiff, in 1830, the land in question, and that the other daughter of Albert Bunnell, Sr., conveyed the same land to the plaintiff in 1835.

The defendant claimed that the two illegitimate children of Sally Bunnell inherited Albert Bunnell, Jr.'s, interest in this land in equal proportions with his two legitimate sisters, Polly and Matilda, but the county court held otherwise, and decided that they inherited nothing from Albert Bunnell, Jr., and rendered judgment that the plaintiff recover the seizin and peaceable possession of the premises described in the declaration, together with damages for the wrongful occupation thereof by the defendant, to which judgment the defendant excepted.

G. Harrington, for the defendant.

J. French and *E. R. Hard*, for the plaintiff.

REDFIELD, Ch. J. The objection founded upon the right of illegitimate children to inherit from legitimate children of the

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same mother, is certainly rendered very plausible by the case of *Burlington v. Fosby*, 6 Vt. 83. But we think that case cannot be regarded as an authority, to the extent of the present case. The statute then in force, and the same in force in 1822, when this descent was cast, only provided that "bastards shall be capable of inheriting and transmitting inheritance *on the part of the mother.*" This strictly extends no farther than to inheritance between the mother and the child. It was, by construction, in the case of *Burlington v. Fosby*, extended to create the relation of brother and sister between illegitimate children of the same mother. We are now asked to extend it so as to create the same relation between illegitimate children and legitimate children of the same mother. That is certainly going a very great way beyond the statute. It will enable the mother by illicit means to multiply at will the heirs to the property of her legitimate children, which may thus deprive them, in case of the decease of their brothers and sisters of the enjoyment of the property derived from their own fathers. This is certainly something not contemplated by the court, in the case of *Burlington v. Fosby*, and entirely beyond the purview of the statute. In fact the decision in *Burlington v. Fosby*, evidently goes beyond the statute. The statute probably never contemplated anything more than the present statute more specifically expresses, that illegitimate children should inherit from their mother and she from them. But the court have said that this does create the relation of mother and child and brother and sister among them. But it certainly could not, with any plausibility, be said that the statute had also extended this relation to all the legitimate children of the same mother. Such a construction would be without all warrant of the terms of the statute, and would, in many instances, and the present is one, work positive injustice, in giving the estate, derived from the father of the legitimate children, to the illegitimate children of the mother. It is true, no doubt, that such a result would follow indirectly, had the mother been alive at the decease of Albert, and subsequently deceased. But that would be, in different proportions and upon different grounds, and in compliance with the express provisions of the statute, which being general, will sometimes work a result, in some respects different from that for which they were spe-

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cially designed. We do not regard that as any sufficient reason why the courts should produce a result still more aside of the general purpose of the statute, and by construction merely. When courts depart from the natural import of the words of a statute, by way of construction, it is allowed only for the purpose of avoiding some result, obviously not intended by the statute, or else to secure a result which was very clearly intended by the statute. We think therefore that there is no sufficient reason for reversing the judgment, in the errors assigned at the hearing.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON,
AT THE
JANUARY TERM, 1860.

PRESENT:
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. LUKE P. POLAND,
HON. ASA O. ALDIS, } ASSISTANT JUDGES.
HON. LOYAL C. KELLOGG, }

JAMES FITTS v. WILLARD WHITNEY.

Deposition. Service.

The only notice which the defendant received of the taking of a deposition offered by the plaintiff on trial, was by a citation signed by the justice who took the deposition, naming the time and place of taking, and served on the defendant by the officer, to whom it was directed, merely by *reading*. *Held*, that this was not a sufficient service of the citation, and that the deposition was not admissible.

It seems that the *personal notice* of the taking of a deposition, which the statute provides may be given to the adverse party by the magistrate taking the deposition, must be given by the magistrate himself, *viva voce*, in the presence and hearing of the party to be notified.—REDFIELD, Ch. J.

Fitts v. Whitney.

CASE. The only question in this cause related to the admissibility of a deposition offered by the plaintiff, to the admission of which the defendant objected, on the ground that he had not been legally notified of its taking.

It appeared that the only notice which the defendant received of the taking of the deposition in question was by a citation, which was served on him by an officer merely by *reading*. This citation was signed by the justice taking the deposition, and the defendant raised no objection to its form or substance, but merely to its mode of service.

The county court, at the December Term, 1859,—Pierpoint, J., presiding,—excluded the deposition, to which the plaintiff excepted.

Linsley & Prout, for the plaintiff.

Briggs & Nicholson, for the defendant.

REDFIELD, Ch. J. The only question in the present case is in regard to the sufficiency of the notice of taking a deposition, the citation being served by reading only, and there being no other notice. The statute requires that the party taking a deposition shall “either cause personal notice to be given by the magistrate taking such deposition to the adverse party, or a citation signed by a justice to be served on the adverse party, etc., in the same manner as a writ of summons,” etc.

It seems to us these provisions are too specific to admit of much latitude of construction. What is meant by giving personal notice by the magistrate to the adverse party is susceptible of some possible variation of interpretation perhaps. Its most obvious and natural signification undoubtedly is, that the notice shall be given by the magistrate *viva voce*, in the presence and hearing of the adverse party. This is probably what was intended, and this has probably been the practical construction of the statute. To extend it as far as is claimed in this case, so as to include the reading of a citation in the hearing of the adverse party, would altogether confound the two modes of giving notice, which must be an evident perversion of the statute. We certainly could not

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give it this extension. And it would be safer probably and more in accordance with the former practice, in regard to this subject, to restrict it to the natural import of the words of the statute, as we have before indicated. But it is not necessary to go that length in the present case perhaps.

In regard to the notice by citation, there does not seem to be any room for doubt. The statute requires, in express terms, that the service shall be in the same manner as writs of summons, and this is by copy only. There was then no legal service of the citation. The reading of the citation in the hearing of the party is no more service of a writ of summons, than handing it over to be read by the party, or writing him a letter, stating the substance, which the party is shown to have received.

In either case there is a kind of knowledge communicated, which would be sufficient for the ordinary purposes of notice, in regard to matters resting wholly *in pais*, and where the law had prescribed no particular form of notice. But in a case like the present, where a specific form of notice is required, the party is not bound to act upon any thing different. He is justified in staying away, under the expectation that the testimony will not be received.

Judgment affirmed.

LUTHER M. KENT v. THE TOWN OF LINCOLN.*Notice. Pleading. Evidence. Highway. Practice.*

In an action against a town for damage sustained through the insufficiency of a highway, the plaintiff need not aver in his declaration that he gave notice to the selectmen of such town of the injury and his intention to claim satisfaction therefor, as required by statute (Acts of 1855, No. 15, p. 18.) Such notice is no part of the cause of action, but pertains merely to the remedy and evidence.

In actions against towns for injuries alleged to be sustained in consequence of the insufficiency of a highway, evidence of the effect on carriages driven by other persons than the plaintiff, over the same road, has a tendency to show

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its fitness or unfitness for public travel, and is therefore competent, whether such carriages are like that driven by the plaintiff, or not, and notwithstanding no evidence be given as to the rate of speed, or degree of care with which they were driven.

One who has brought an action for personal injuries may prove, as tending to show their nature and extent, his own statements made, while suffering under such injuries, to an examining physician in regard to his inability to move certain portions of his frame, and the pain produced by other motions, notwithstanding such examination was made by the physician after the commencement of the suit, and with a view of being a witness at the trial in regard to the character of the plaintiff's injuries.

If, in the close, the plaintiff introduce proof of a new and distinct fact, not fairly notified to the defendant by the opening proof, so as to enable him to answer it in his general evidence, he must be allowed to answer or contradict it afterwards, and it is error for the court to refuse him the opportunity to do so.

CASE for an injury to the plaintiff, occasioned by the insufficiency of a highway which the defendant was bound to keep in repair. Plea, the general issue, and trial by jury, at the June Term, 1859,—BENNETT, J., presiding.

No question was made but that the plaintiff, on or about the 3d day of May, 1858, received a personal injury by being thrown from his wagon while crossing a water bar upon a highway, which it was the duty of the defendant to keep in repair. The defense was placed upon the grounds that the water bar was a proper and suitable one in that place; that the road was not out of repair, and that the plaintiff was thrown from his wagon, and the injury occasioned, by reason of the king bolt of his wagon being too short and not properly secured, and by his driving in a careless and reckless manner.

The plaintiff, for the purpose of establishing the insufficiency of the road, by the testimony of F. P. Wheeler and Dr. Hasseltine, offered to prove that about the time of the accident they each passed over this road in a vehicle called a sulky, one in the day time and the other in the night, and that in crossing the water bar at the place where the injury was received, they were each thrown from their seats, and nearly out of their vehicles, and by sundry other witnesses that they had driven along the road at the point in question, and had been jolted or thrown from their seats

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at various times during the period of five months before the happening of the injury. This evidence was objected to by the defendant, but admitted by the court, and the defendant excepted. The witnesses severally testified according to the offer, but did not state anything, nor were they questioned by either party, in relation to the manner in which they were driving at the several times when they passed over the water bar.

The plaintiff called several physicians or surgeons to show the character and extent of the injury received and its probable permanency, one of whom, Dr. Russell, testified to a very full personal examination of the plaintiff's injuries, made by him four or six weeks before the trial, and long after the commencement of the suit. And in detailing the results of the examination, the witness stated, under objection from the defendant, the declarations and statements made by the plaintiff during the examination, as to the effect and pain at the time produced by certain movements of his arm and other parts of his body; also as to his inability at that time to move his arm in a certain direction, which statements the court admitted as a part of the examination. It appeared that this examination was made in order that Dr. Russell might be a witness on the trial to show the nature and extent of the injury. To the admission of Dr. Russell's testimony, as to these statements of the plaintiff, the defendant excepted.

Evidence tending to show various measurements of the water bar was introduced. The direct evidence of the plaintiff tended to show that shortly after the injury, the depression at the side of the water bar was partially filled up, but that at a measurement of the bar made by one Bush and other witnesses on the part of the plaintiff, the dirt thus thrown in was removed and the bar measured as it was when the injury was received. The defendant produced a pattern of the water bar made four or five days after the measurement by one Bush and others, and introduced evidence tending to show that when the pattern was made, the bar was in the same condition as when the Bush measurement was made. The plaintiff then recalled Bush and was permitted to give evidence from him and others tending to show that after they finished measuring, and at the same time, he replaced the dirt thus removed as they found it. The defendant then offered to give

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evidence from Charles Clark and others, tending to show that they were present at the time the Bush measurement was made, and that Bush did not replace the dirt in the manner his testimony tended to prove. This was objected to by the plaintiff, and rejected by the court, as being offered out of time, to which the defendant excepted.

The jury rendered a verdict for the plaintiff, whereupon the defendant moved that judgment be arrested on the ground that the declaration was defective and insufficient, because it contained no allegation that any notice was given by the plaintiff to the selectmen of the defendant town of his intention to claim damages for the injury within thirty days, after it was sustained, according to the statute, but the court *pro forma* overruled the motion in arrest, to which the defendant excepted.

Evidence by parol was introduced on the trial, without objection, of the giving of such notice, and no question was made to the jury as to the sufficiency of this evidence to establish the fact.

F. E. Woodbridge and E. J. Phelps, for the plaintiff.

J. W. Stewart and Roberts & Chittenden, for the defendant.

POLAND, J. I. The question raised by the motion in arrest is whether it was necessary for the plaintiff to set forth in his declaration that, within thirty days after his injury upon the highway, he gave notice to one of the selectmen of Lincoln of the same, and that he should claim damages of the town therefor. It is not claimed by the plaintiff but that his case comes within the act of 1855, requiring such notice to be given in all this class of cases, arising subsequent to that act. It is insisted on the part of the defendant that this notice is a necessary element of the plaintiff's cause of action against the town, that it is a condition precedent, which must be performed by the plaintiff before any right accrues to him, or exists, to recover damages of the town.

If this be the true nature of this requirement, then it ought to be averred in the declaration, because that should set forth all such facts as are necessary in order to show that the plaintiff has

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a legal cause of action against the defendant. But upon an examination of the statute, and taking its language in connection with the evident object and purpose of the enactment, we think this is not its true character and purpose, that the cause of action is complete and perfect, when the plaintiff has sustained special damage by reason of the insufficiency of a highway, and that this notice, which is required to be given, is only a step in the process for enforcing the legal remedy, and though it must be taken and may be required to be proved, it need not be set forth in the declaration that sets out the cause of action.

The act of 1855 bears some analogy to the statute of limitations. The plaintiff is not required to commence his suit within thirty days after the injury, but he is required to give notice within that time that he intends to prosecute his claim, and if he does not take this step his right to recover is barred. The analogy is not perfect between this act and the statute of limitations, because a defendant, to take the benefit of the statute of limitations, must ordinarily set it up specially by plea, and if he does not the defence is waived.

But this notice being an act required to be done by the plaintiff, a fact peculiarly within his knowledge, he would be required to show that he had complied with this preliminary requisite to the sustaining his action. There is also a close analogy between this case and the decisions that have been made under the statute of frauds, and various other statutes which have required some new thing to be done in order to make certain contracts valid in law, which before were good though in parol merely. The statute of frauds requires certain classes of contracts to be in writing, and the plaintiff, in a suit upon such contract must prove it to be in writing, but the declaration need not aver it to be so. The reason given is, that the statute has not altered the rules of pleading, but only requires that the contract shall be proved in a particular manner, and the party may declare in the same manner as before the statute. But in such case it enters into the cause of action itself, and if the party cannot show the contract to have been in writing, &c., he shows no cause of action whatever. In this case the action was originally given by statute, and not by the common law, but it existed long before this statute, indeed,

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since the earliest legislation in the State, and this principle may aptly apply to it. There is no doubt at all that where a notice of a particular fact to the defendant is necessary in order to make out a cause of action against him, either by express contract or by implication of law, such notice must be averred in the declaration, because without such averment the declaration shows no cause of action. A declaration against the endorser of a note is a familiar instance of this; the declaration must allege notice of the non-payment by the maker, because without such notice the endorsee is not liable.

The object of this statute is apparent enough from the statute itself, and the reasons and history of its passage are well known. When a person actually sustains damage upon a highway, the fact may not be known to the authorities of the town, or if that be known, it may not be known that any claim will be made against the town. All towns have many miles of highways, and the town authorities are constantly shifting among many different persons. If no claim be made upon the town at the time, and no notice given that any will be made, no examination of the highway is made, and when after the lapse of years a claim is set up, and when the condition of the road has been entirely altered by the changes of the seasons and repairs, it often becomes difficult for a town to show what was the actual condition of the road at the time of the injury. Still greater is the danger when an unfounded and false claim is made for damages pretended to have been sustained years before the claim is set up. It was to remedy these evils that the statute was passed, that the authorities of the town might know within thirty days of the claim, and thus have a full opportunity to have the road thoroughly examined, and ascertain all the circumstances attending the injury complained of.

It is said that another object was to enable the town to tender amends to the claimant. But we think this could have had very little to do with it, for as the law was then, no tender could be made in the case of personal injury, and where a tender could be made at all, it might be made at any time whenever a suit should be brought. Whether this notice must be given before the action is commenced, and if not, whether, if a suit is actually com-

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menced within the thirty days, any further notice need be given, are questions that need not now be decided.

What we decide is that this notice is not a part of the plaintiff's cause of action, that it pertains to the remedy and evidence merely to enforce and support his claim, and need not be set forth in the declaration.

II. The testimony of Wheeler, Hasseltine and others as to the effect produced upon their carriages in passing over the water bar, was correctly admitted. One important point in the case, and in all this class of cases, is whether the condition of the road was such as to make it insufficient and unsafe for public travel. The effect, which this bar had upon a carriage passing over it, would aid in determining that question, whether the carriage driven over it was like the one the plaintiff drove or not. The effect on any carriage would be proper to be considered by the jury. The main objection made to this evidence is that it was not shown that these persons drove with reasonable prudence and care, and that as the plaintiff could not recover unless he used such prudence and care in driving, therefore no effect of the road upon a carriage was proper evidence, unless proved to be driven in that manner. But we think this does not follow, and that it might be shown what effect was produced on a carriage driven at a speed conceded to be unreasonable and unsafe for an ordinary traveler. All these effects produced in going over the road were in the nature of experiments to show the actual condition of the road at the time, and whether it was safe or unsafe. The more minutely and clearly each one was understood by the jury, the rate and manner of the driving, the kind of the carriage used, and the exact effect produced upon it, the more valuable would the evidence become, but neither party could make such evidence improper by omitting enquiries that would elicit all these particulars.

III. The statements of the plaintiff made to Dr. Russell, and testified to by him, were correctly admitted; that relating to his inability then to move his arm in a certain direction, as well as the rest. Mr. GREENLEAF says "so also the representation, by a sick person, of the nature, symptoms and effects of the malady under which he is laboring at the time, are received as original

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evidence. If made to a medical attendant, they are of greater weight as evidence; but if made to any other person, they are not on that account rejected;" 1 Vol. Ev. sec. 102. His complaint that he was unable to move his arm was as admissible as a complaint of pain in his arm or his head. The weight of these statements are always to be determined by the jury, and unless the external symptoms and appearances of the person correspond with, and support his statements and complaints, they usually have very little weight. This species of evidence was undoubtedly admitted originally and mainly because parties could not testify, and this was the only mode of proving it, but it is equally admissible now, though the necessity is less. That they are made during the pendency of the suit, does not render them inadmissible, though it would generally doubtless detract from their weight.

IV. The only remaining point is, as to the correctness of the exclusion of the testimony of Clark and others offered to contradict Bush: Were the defendants legally entitled to have that evidence admitted when offered? If the defendants had not the strict legal right to have it admitted then, and it rested in the discretion of the judge below, whether he would depart from the ordinary rule of practice and admit it, then we cannot revise his decision; whether he decided to adhere or to depart from the rule, his decision, when it rests in discretion, is conclusive.

The general rule in relation to the order of evidence is well established in this State. The plaintiff is entitled to rest upon making a *prima facie* case. The defendant is then to introduce all his evidence in answer to the plaintiff's claim. The plaintiff is then allowed to introduce testimony to rebut the evidence given by the defendant, and also additional evidence in support of his case as made in the opening, and ordinarily this closes the evidence.

But in practice these general rules have always been so applied, (and in justice should be,) as to give each party an opportunity to answer and controvert every fact, and to contradict or impeach any witness introduced by the opposite party. If a witness be called for the first time by the plaintiff in the close, the defendant must afterwards be allowed, if he wishes, to

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impeach such witness by evidence to show his general bad character or otherwise, as he may be able. So, too, if in the close the plaintiff introduces proof of a new and distinct fact, not fairly notified to the defendant by the opening proof, so as to enable the defendant to answer it in his general evidence, he must be allowed to answer or contradict it afterwards, and the court have no discretion to refuse him the opportunity to do so, and their refusal would be error. It appears by the exceptions that the plaintiff in his opening evidence proved a measurement of the bar in the road by Bush and others. The defendant then introduced evidence of a measurement made after that of Bush, and a plan to exhibit it, showing the inequality in the road to be less than that made by the measurement of Bush and the plaintiff's other witnesses, and also that the road was then in the same condition as when measured by Bush. It does not appear precisely what the defendants' evidence was to show the condition of the road to be the same, but the fair inference is that it was from witnesses who saw it when Bush measured it, or who knew the condition of the road before. The plaintiff, in his reply, recalled Bush, who testified that after he made his measurement and before the defendants' measurement was made, he (Bush) filled up the depression by the side of the water bar, so that the condition of it was changed and the depression less than when he measured it.

The defendant then offered to prove by Clark and others that they were present at the time Bush testified to having filled up the depression, and that he did not fill it up as he stated. It does not appear from the exceptions that this fact was attempted to be proved in the opening by the plaintiff, or that any proof was given that would fairly advertise the defendant, that such proof would be given in the close. If therefore the defendant was not allowed to contradict this after Bush testified last, it does not appear that he had any opportunity to do it at all. For aught that appears the only evidence of the defendant to show the road, when his measurement was made, to be in the same condition as when measured by Bush, and when the accident occurred, was the general observation and opinion of witnesses who had seen the road. Evidence of this character would be very likely over-

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borne by the evidence of a single witness who should swear that he in fact changed its condition. Evidence to show directly that his statement on that subject was false, was clearly admissible to contradict and impeach the witness, and we think from what appears that this distinct and important fact, having been brought forward for the first time in the close, the defendant ought to have been permitted to introduce evidence to disprove it, that it was not within the proper discretion of the court to refuse it, and the refusal is error. For this reason alone, the judgment is reversed, and a new trial granted.

JOSEPH MORSE v. SAMUEL RANNO AND WALTER ROBBINS.

Dedication. Adverse possession. Highway. Common.

The mere act of leaving land, between the owner's house or store and the highway, unenclosed, for the purpose of making access to such house or store more convenient, does not of itself constitute a dedication of the land to the public use.

The omission to fence land adjoining the highway is no proof of an intent to dedicate it to the public.

But if the public appropriate it to their use, and continue to use it for the space of fifteen years or more, *for the ordinary purposes of a highway*, then they acquire the *right* so to use it.

When a highway is thus acquired by occupation, its extent must be determined by the extent of the actual possession and use.

Such possession and use by the public for a less period than fifteen years may be sufficient to show a dedication, where it is accompanied by other acts or circumstances proving an *intent* on the part of a donor or grantor to make such dedication.

TRESPASS for cutting down and removing a fence built by the plaintiff. Plea, the general issue, and notice; trial by jury at the December Term, 1859,—PIERPOINT, J., presiding.

The plaintiff's evidence tended to show that the defendants cut

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down and removed a fence built by him, west of his house, on premises which he owned and occupied; that this fence was on or near the east line of the highway leading from Salisbury to Brandon, and on or near the south line of the highway leading from the dwelling house of Charles Church to Leicester meeting house. The deed to the plaintiff of the premises occupied by him was dated in 1858, and therein the land conveyed was described as bounded on the west by the east line of the highway.

The defendants gave evidence that the plaintiff erected said fence a short time previous to its removal, and that they removed it in pursuance of the direction of the selectmen of Leicester, (the defendant Ranno being one of the selectmen) as being in the highway and an encroachment upon the public travel. The defendants' evidence also tended to show that said highway through Leicester, leading from Salisbury to Brandon, was surveyed in 1797, and soon afterwards fenced and worked, and had been used and traveled as such ever since; that it was originally laid out six rods wide, but had not for many years been occupied more than three or four rods wide, and that the fences on both sides of it had been brought into the highway; that the highway running east and west had been used for more than thirty years, as traveled previous to and at the time the plaintiff erected the fence in question. The defendants further proved that the ground in front of the plaintiff's house from a point opposite his barn to the east and west road, thence east on the south side of said road to a point nearly opposite the northwest corner of the house, had been open and unenclosed for forty or fifty years prior to the plaintiff's building said fence; and gave evidence tending to show that while John Smith owned the premises he kept a store in said house and used said ground as a common, and after he sold to Isaac Morse the house was used as a dwelling house, and has ever since been so used, and the grounds have remained open and unenclosed until the plaintiff made the fence in question. The defendants also gave evidence tending to show that the fence erected by the plaintiff interfered with the accustomed travel, which had always been in the same place, on the north and south road; that the travel from the east, around the corner to the south, passed directly over where the fence was built, and that it

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was only about twelve feet from said fence across to a ledge marked on a plan introduced in evidence.

The plaintiff introduced evidence tending to show that the ground covered and enclosed by said fence was within the limits of his deed; that said fence was neither within the limits of the highway as originally surveyed, nor as actually traveled; that said highway had been gradually working east, and had not been, during the fifteen years before the removal of the fence, so far to the east, opposite said fence, as it then was; that the land in front of his house and between that and the highway, though unenclosed until a recent period, had never been in any way, by him or his grantors, relinquished or dedicated to the public, or occupied by the public otherwise than for the purpose of entering or departing from his house, or store, when used as such.

The defendants requested the court to charge the jury as follows: first, that if they found that the highway north and south was opened and worked upon the line of the original survey, that would determine the location of the highway, and that the public would have the right to the highway so surveyed, worked and occupied; second, that the fact that the ground where the fence was put by the plaintiff and removed by the defendants, under the order of the selectmen, having remained open to the public for fifty years, constituted a dedication to the public, and that the plaintiff had no right to enclose it against the public; third, that it was not material that the part of the highway claimed as such should be actually used at all times for the travel of teams and carriages, but if occasionally used, and if it was convenient to the public travel, the plaintiff could not lawfully enclose it; fourth, that if the jury should find that the highway had been for such long period of time occupied, used and traveled, substantially in the same place where it was traveled when the plaintiff erected his fence, it was immaterial where the original survey was made; and that the public would have a right to said highway as located and used; fifth, that the selectmen having, upon examination, determined that the fence erected by the plaintiff was an encroachment and nuisance upon the highway, and having acted in good faith, it was a matter within their jurisdiction, and at least *prima facie* evidence of the fact; sixth, that the plaintiff's

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title confined him to the east line of the highway, and if the *locus in quo* was not included in the conveyance, then the plaintiff could not possess himself of this land, under the circumstances, against the public; seventh, that the plaintiff's deed, in 1858, confined him to the east line of the highway, and that the highway referred to in said deed must be regarded as the highway as then used.

The court declined to charge as requested, but charged the jury that if they found that the place where the plaintiff erected his fence, and from which the defendants removed it, had never been before enclosed since the highway was laid out and opened, and was embraced within the limits of the highway as originally surveyed and opened, then the plaintiff had no right to erect the fence, and could not recover in this suit; that if they found that the plaintiff, or those under whom he claimed, had thrown the land in front of the dwelling house open to the public, and had dedicated it to the use of the public, and it had so remained until the time the plaintiff erected his fence, then the plaintiff could not recover; but that the mere act of leaving the space in front of his house and between that and the highway, open, as unenclosed ground, without any other act tending to show a dedication of it to the public use, would not of itself constitute a dedication of it to the public use, and deprive the plaintiff of the right to enclose it; but that if the jury should find that the public had appropriated it, or any part of it, to their use for a highway, and had continued to use it as such for a space of fifteen years or more, then, to the *extent* to which they had so used it, the public would have acquired the *right* to use it, and the plaintiff would have no right to fence or enclose it, so as to prevent or interfere with the use of the same by the public, as they had been accustomed to use it during such period of time; that to vest this right in the public, on the ground of use alone, the jury must find that the public had, during such period, continued to use it for the ordinary purposes of a highway; that the fact that a traveler had occasionally passed across the place in question, the travel being generally off from it, would not be sufficient; that if the public had acquired a right by fifteen years use of the premises, their right was limited to the extent of their use

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and that if the jury found that the fence which the defendants had removed was not within the limits of the highway as originally surveyed, and was not within the traveled path of the highway, nor so near it as to prevent or interfere with the use of it as the public had been accustomed to use it for the fifteen years preceding the erection of the fence, then the plaintiff was entitled to recover; but that if they found that the fence was put within the limits of the highway as originally surveyed, or within the traveled path of the highway as it had been used for the period of fifteen years preceding, or so near as to interfere with the use of said highway as the public had been accustomed to use it during said period, then the defendants were entitled to a verdict.

To the foregoing charge, and to the refusal to charge as requested, the defendants excepted.

Briggs & Nicholson, for the defendants.

1. Upon the question of dedication the instructions of the court were too narrow. It was a conceded fact that the ground in controversy had been used as a common for forty or fifty years, in which uses the plaintiff and his grantors had acquiesced. This constitutes a dedication, and no other *act* of dedication was necessary.

It is not necessary that the public should use the way or common for fifteen years to acquire a right; *State v. Wilkinson*, 2 Vt. 480; *Rugby Charity v. Merryweather*, cited in note, 11 East. 375; 5 Taunt. 126.

2. The proposition embraced in the third request is self-evident. It is this: that a right may be acquired by an occasional use of the way, it being convenient to the public and long continued, and that it is not necessary that it should have been used at all times for travel of teams. But the court say, the fact that a traveler had *occasionally* passed across the place in question, the travel being generally off from it, would not be sufficient. This is a hypothesis that the case does not call for, and was no answer to our request.

3. The charge, under the 4th request, limits the right of the public to the original survey of the highway, whereas the mere occupation of it by the public would restrict the right.

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4. The court should have noticed the 6th request. The description in the deed to the plaintiff dated February 15, 1853, refers to the highway as it then existed. The plaintiff's title was limited to the highway, and his right should be restricted accordingly.

The charge of the court confines the right of way to the traveled part of the highway, unless an actual survey can be shown. This we think is error. A right of way should carry with it sufficient breadth for all the contingencies of travel, especially at points surrounded by ledges and pitfalls.

Linsley & Prout, and *E. J. Phelps*, for the plaintiff, contended that the proposition that the land having remained open for fifty years, of itself amounted to a dedication of it to the public, was erroneous; that the intention of the owner to dedicate it must appear, as well as an acceptance of it by the public; *Page v. Weathersfield*, 13 Vt. 424; *Blodgett v. Royalton*, 14 Vt. 288; *State v. Trask*, 6 Vt. 355; *Commonwealth v. Kelly*, Liv. Law Mag. March, 1853, p. 169.

ALDIS, J. This case was submitted upon the briefs of the counsel, and we notice therefore only the points made by the excepting party.

I. It is claimed that the charge of the court was erroneous upon the subject of dedication, in this, that, as it was a conceded fact that the ground in controversy had been used as a common for forty or fifty years, no other act of dedication was necessary.

We think what is here claimed as a conceded fact does not appear to have been either conceded or proved, or that there was even any evidence tending to show that it had been used as a common by the public.

It was conceded that the land had never been enclosed by a fence, but that clearly was no evidence that it had been used by the public as a common. Since 1839, the owner of lands adjoining the highway has not been required by law to fence improved lands upon the line of the highway. The omission to so fence them is no proof whatever of an intent to dedicate them to the public, and the instruction of the court upon this point was entirely right. Nothing formerly was more common than for

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farmers, and even for those residing in villages, to leave vacant and unfenced yards in front of their houses. It would be against the common sense and universal experience of the community to infer an intention to dedicate such grounds to the public. All that is said in the exceptions as to its being used as a common is, "while John Smith owned the premises he kept a store in the house and used said ground as a common." We think this language cannot fairly be held to mean anything more than that he used the land for people to drive over and occupy for the purpose of coming to his store to trade. The expression is that he used the ground as a common, not that the public used it. *How* he used it, or what acts he or others actually did on the land in so using it, are not specified. In the absence of more specific proof we must consider that he used it as a common only for his private benefit, viz: that he left it open and not fenced from the road so that his customers might have more ready and convenient access to the store. This, too, would not be the least proof of a dedication. And this was all the evidence we can find that tended in that direction. There was, therefore, no evidence of any positive intent or act of the plaintiff or his grantors to dedicate the land to the public, and the right of the public must rest, therefore, upon mere use or possession, unaccompanied by other acts or circumstances.

It is claimed that a dedication may be shown by a possession by the public for less than fifteen years. This is unquestionably true when the enjoyment by the public is accompanied by other acts and circumstances showing an intent on the part of a donor or grantor to make a dedication. Thus, where the owner of land opens a street through his premises, sells building lots and induces others to buy and build on the street, a much shorter possession than fifteen years would suffice to establish the dedication. In such case it would be fraudulent in the owner, after having induced others to act upon the faith of the street's being appropriated to public use, then to attempt to defeat the public use. So where papers, writings, or deeds defectively executed evince the intent to make a dedication of land to the public, a corresponding possession of less than fifteen years may sometimes suffice. Cases of this kind go much upon the ground of proof of

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an actual *intent* to make the dedication, and that upon the faith of the supposed dedication the public or individuals have relied, and made investments, or erected buildings whose values would be impaired by the withdrawal of the land from public use.

But in this case no act or intent of the plaintiff or his grantors is shown; there is nothing but use by the public as a highway for travel and mere silent acquiescence, or, rather, mere omission to resist such use by the plaintiff. The right of the public, therefore, stands upon the basis of mere enjoyment, unaccompanied by other acts or circumstances; in short, upon adverse possession, and must be continuous and for that period of time (fifteen years) which ripens possession into title. The charge of the court placed the case on this ground, and we think was entirely correct.

Where a highway is thus acquired by occupation, the extent of the acquisition, the width of the road, must be determined by the extent of the actual occupation and use. There can be no constructive possession beyond the limits which are defined by the user upon the land, or by other marks or boundaries marking the extent of the claim. In this case there does not appear to have been any evidence of claim, or any showing of marks or bounds to extend the right of the town beyond the line of actual travel.

Judgment affirmed. ✓

THE STATE OF VERMONT v. JOHN HARTIGAN.*Criminal law. Attempt to commit rape.*

If one lay hold of a woman and use force upon her, with intent to have sexual intercourse with her against her will, and she resist his attempt for a while, but finally consents to the sexual connection then had with him, he is guilty of an assault, with intent to commit a rape.

INFORMATION in two counts, the first charging rape, and the second an assault with intent to commit a rape. Plea not guilty, and trial by jury at the December Term, 1859,—PIERPOINT, J., presiding.

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The prosecution called Orilla Vincent, the person upon whom the offence was alleged to have been committed, as a witness, who testified in substance as follows :

"On Sunday morning, Mr. and Mrs. Rockwell went to meeting. I was their hired girl. No one else there. Respondent came into the house ; offered to play with me. I told him no. He said yes, that is the way the girls always do. He said he wanted something to eat. I said he had only just been to breakfast. I went into the pantry to get him something to eat. The cat was in there ; I drove her out. He came in and asked me if I did not want to have a little baby. I told him no, I would not have one for three hundred dollars. He took hold of me and pushed me against a flour barrel. I told him to let me go, he hurt me against the barrel. He then pushed me on to the floor and forced me. When he went out I locked the pantry door. He went round to the window. I told him if he came into the window I would tell Mr. Rockwell. I went up stairs to my room. He came up and wanted me to open the door, and I would not. He said he would pay me if I would not tell ; that he would give me a silk shawl ; that he had hired to Mr. Rockwell for two or three months, and he would give me anything if I would not tell. When Mrs. Rockwell came home I was setting the table.

When he came into the buttery I did not know what he wanted. When he took hold of me I was frightened and could not resist. When I was down he had his hands on my arms and kept them there all the time. His mouth was right on my mouth so that I could not speak or cry out. After he got through I could see marks on my knee and on my arm.

Cross-examined.—I am twenty-one years old next month ; have worked out four years ; the only girl Mrs. Rockwell had ; their family consists of eight persons. Think it was about half an hour after John came into the pantry before he got through. He staid there longer, an hour and a quarter in all. He lay on me just as long as he wanted to. He lay on me till I heard somebody coming. I told him I heard somebody coming ; then he got off. I did hear somebody coming. He then went and locked the front door. He talked with me a little before he took me on to the floor.

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When he took hold of me, I said go away. I could say nothing more; this was all the noise I made; he had his mouth right on mine all the time, so that I could not cry out. I told him when he pushed me against the barrel that he hurt me; then he took me on to the floor.

His hands were holding my arms all the time, from the time he took me down until he got through. He offered me some money; I would not take it; he threw it on the floor. This was a little before Mr. Rockwell came home. It was twenty-five cents; I picked it up and gave it to Mr. Rockwell."

Mrs. John Rockwell—"When I came home Orilla was spreading the table; I spoke to her and passed along; I asked her what was the matter; she made no complaint until I spoke to her and asked her what was the matter; she then complained of his abusing her. I saw some prints of nails on her arms, and some spots rather black and blue."

This was all the testimony on the part of the prosecution. The complainant was a woman of good health and strength, of medium size,

The prisoner was apparently about thirty years of age, of medium size, and apparent strength.

The respondent introduced Dr. Charles L. Allen and Dr. Z. Bass, physicians and surgeons, of good professional character and reputation, who testified that from the size and appearance of the parties, it was practically impossible that sexual connection or penetration could have taken place under the circumstances stated by the witness, Orilla Vincent, unless she had consented thereto, and on cross-examination gave their reasons for such opinion.

This was all the evidence in the case.

The court charged the jury in a manner satisfactory to the prisoner's counsel, as to the first count, and as to the second count, the court told the jury that if they found that the respondent, upon the occasion testified to by Orilla Vincent, laid hold of her person and pushed her against the barrel, and on to the floor, with the intention and for the purpose of having sexual intercourse with her by force and against her will, and that she resisted for a time, but ultimately yielded, they might find him

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guilty under that count, although they might find that the sexual connection which he then had with her was with her consent. To this charge the respondent excepted.

The jury acquitted the prisoner on the first, and convicted him on the second count,

Roberts & Chittenden, for the respondent.

W. F. Bascom, State's Attorney, and *J. W. Stewart*, for the prosecution.

KELLOGG, J. The information against the respondent in this case contained two counts, the first charging him with the commission of the crime of rape upon one Orilla Vincent, and the second charging him with an assault upon the same woman with intent to commit rape upon her. On trial the respondent was acquitted on the first count, and convicted on the second count.

The evidence on the trial is detailed in the respondent's exceptions, and the court instructed the jury that if they found that the respondent, upon the occasion when, as it was alleged and testified to by the woman Vincent, each of the said crimes was committed, laid hold of her person, and pushed her, as stated in her testimony, with the intention and for the purpose of having sexual intercourse with her by force and against her will, and that she resisted for a time, but ultimately yielded, they might find him guilty under the second count, although they might find that the sexual connection then had by him with her, which followed, was with her consent. The respondent excepted to the charge of the court on this point.

Whatever might be our opinion respecting the sufficiency of the evidence to warrant a conviction of the respondent on either count, our duty at this time is to be confined to the examination of the errors assigned in the charge of the court to the jury, to which the respondent's exceptions exclusively relate. It is an assumption of the very point in controversy to say that the facts given in evidence constitute one entire transaction, and that as the jury have acquitted the respondent of the greater offence, he cannot be convicted of a lesser one on testimony which was a part of the evidence introduced to establish his guilt of the

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greater offence. The jury have found by their verdict that the respondent did, on the occasion testified to, assault the woman with the intention and for the purpose of having sexual intercourse with her by force and against her will, and that she resisted for a time, although she ultimately yielded. These facts are all which are essential to be established in order to make out the proof that the crime was complete. And we consider that the charge of the court in respect to the resistance of the woman referred by reasonable intendment to a real resistance on her part, made in earnest and good faith, and that the charge, so understood, was all which could be required on that point.

But it is claimed that the subsequent yielding and consent of the woman to the sexual intercourse, which followed, has relation, back to, and covers the preceding acts; or, stated in equivalent words, that the ultimate consent of the woman should have a retro-active effect, by relation, and operate as a condonation of a crime which had become complete. The rules of criminal law are not founded upon legal fictions, and the doctrine of relation, however useful it may be as a rule defining or regulating private rights in a civil suit, has no application in criminal proceedings. On this point the rule, as stated in 3 Greenleaf's Evidence, sec. 211, is that if the woman was first violated and afterwards forgave the ravisher and consented to the act, still the particular offence in question being committed by force and against her will at the time of its commission, the crime is in legal estimation completed; these circumstances being only admissible in evidence on the part of the respondent to disprove the allegation of the want of consent. The same rule is stated in 1 Russell on Crimes, 677, and also in Roscoe's Criminal Evidence, 860. It has never been regarded as a legal excuse for the consummated offence that the woman consented after the fact, and we regard this principle as being applicable to the case of an assault with an intent to commit a rape as well as to the higher offence. It is, in our judgment, decisive of the questions raised in this case, and as we find no error in the instructions given by the court to the jury, the respondent's exceptions are overruled.

On the application of the respondent the case was remanded to the county court to pass sentence.

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WILLIAM VINTON v. CHARLES SCHWAB.

Negligence. Jury.

The question of negligence is not always a matter of law where there is no conflict in the testimony as to the particular facts. If it still rests upon discretion, experience and judgment to determine whether the acts complained of constituted a departure from the course which men of ordinary care and prudence would have pursued under the same circumstances, it is matter of fact for the jury.

CASE. Plea, the general issue and trial by jury, at the December Term, 1859,—PIERPOINT, J., presiding.

The plaintiff's evidence tended to show that in January, 1859, the defendant, who was a pedler, had stopped his horse, attached to a traverse sleigh, with a pedler's box upon it, in front of a house in Granville, a little out of the traveled path, and while standing at the rear of his sleigh, taking out some goods and holding a box of goods in his hands, the plaintiff drove up in his cutter, passed between the defendant's sleigh and the house, halted a moment and passed on; that about the same moment a brother of the plaintiff drove up in another cutter and passed outside of the defendant's sleigh, so that both cutters passed the defendant's sleigh nearly at the same time, the plaintiff's brother first and the plaintiff immediately following; that the defendant's horse thereupon started, and gradually increasing his pace to a run, overtook the plaintiff, and the plaintiff's sleigh, in consequence thereof, was injured and the plaintiff's horse was killed.

The defendant's evidence tended to show that he was in the pursuit of his business, as a licensed pedler, at the time of the accident; that he had owned the horse about one month, and was accustomed to leave him to stand without being tied, as the occasion of his business required, and had never known him to run or start before or after this occasion, and that he was a fit horse to be so left; that at the time of the accident he did all he could to stop his horse, but was unable to do so. He also gave evidence tending to show that his horse was started by the plaintiff and his brother giving signals to their horses to start when opposite the defendant's horse.

The defendant asked the court to charge the jury that the

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question of negligence, the facts being found or conceded, was one for the court, and that upon the evidence, the defendant was not chargeable with negligence, and the action could not be maintained. That if the jury found that at the time of the accident the defendant was standing at his sleigh in the manner that the evidence showed, and in the pursuit of his lawful business; that his horse was one fit to be left and never known to start or run; that he was started by the passing of the other horses in the manner they did pass, and the defendant did all in his power to stop him, he was not guilty of negligence and was not liable in this action.

The court charged the jury that if they found that the defendant left his horse standing without being tied or fastened in any manner, and went to the hind end of his sleigh to transact business there, leaving the lines beyond his reach, and having no means of immediately controlling his horse in case he should start, as all the evidence tended to show, and that he knew that the other teams were about to pass his team, under the circumstances detailed by the defendant himself, and that men of ordinary care and prudence would not have so left a horse under the same circumstances, then the defendant was guilty of negligence, and liable for all the injury claimed that they found the plaintiff had sustained solely in consequence thereof; and that in determining the question as to what men of ordinary prudence would have done, they would take into consideration the evidence of the length of time the defendant had owned the horse he was then using; the propensity or disposition of the horse to stand without fastening, and the knowledge the defendant had thereof, together with all the other evidence bearing upon this point. To this charge and the refusal to charge as requested, the defendant excepted.

The jury rendered a verdict for the plaintiff, and the defendant moved for a new trial on the ground that the verdict was against the weight of evidence. The motion was overruled, and the defendant excepted.

J. W. Stewart and E. J. Phelps, for the defendant.

Roberts & Chittenden and E. N. Briggs, for the plaintiff.

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REDFIELD, Ch. J. The questions raised in this case upon the trial, and the motion for a new trial, seem to be identical, that is, whether there was any evidence which could fairly have been submitted to the jury?

In regard to questions of negligence, it has often been determined that when the testimony is all in one direction, that is, when all the evidence being taken, as facts, it establishes a clear case of negligence, or when it has no tendency to show any negligence whatever, it may be determined as a question of law by the court, unless some question is made in regard to the credibility of the witnesses from which the testimony comes.

But when there is no conflict in the testimony in regard to the particular facts, that will not always make it a mere question of law which the court may determine. If it still rests upon discretion, experience and judgment, it is matter of fact and not of law merely. A man in any situation or business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances. And it is negligence to make any important departure from such a course, when it proves more injurious to others than the usual course. All this is matter of fact, however, until it becomes so universally known as to be received as axioms are, by universal consent. This can scarcely be said in regard to pedlers leaving their horses unfastened in the highway. It may be a pretty general practice, but by no means universal, I suppose. And when it is done, it is a departure from the usual course, which is the only safe course in regard to teams ordinarily. And when one, for his own convenience or that of his particular pursuit, chooses to adopt such a departure from the general and safe course, he must be regarded as doing it at his own peril, so far as injury may result to others. Every man is bound *sic utero suo, ut alienum non lædat*. And the rule by which he is bound to govern the use of his own is that which is established by the concurrent use of careful and prudent men in that particular business.

When a pedler is unacquainted with the habits of his horse, and knows nothing of the amount of travel upon the road, it could be nothing less than rashness to leave his team in the streets

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unfastened. But after knowing the habits of the beast more or less, and the probability of there being any one about to pass, it would become a question of judgment and discretion whether he could with safety leave his team in the condition shown in the present case, in regard to the defendant. This will certainly reduce it to a question of fact. And until there are some more definite rules established upon the subject, we do not very well perceive any sufficient guide to enable a court to inform a jury precisely what is sufficient care and watchfulness in such matters.

We do not perceive but the question was properly submitted to the jury, and that being the case, the motion to set aside the verdict and for a new trial was matter of discretion, and no question of law can be raised in relation to it in this court.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF RUTLAND,
AT THE
JANUARY TERM, 1860.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE,
HON. LUKE P. POLAND, }
HON. ASA O. ALDIS, } ASSISTANT JUDGES.
HON. JAMES BARRETT, }

CHAPMAN, LORD, WRIGHT & Co. v. DEVEREUX & NOYES.

Partnership.

A and B were two accredited agents of the New England Protective Union, A for the making of purchases, and B for the selling of produce. By the rules of the association, all purchases were required to be for cash, and not on credit; and this rule was known to both plaintiffs and defendants. A purchased from the plaintiffs, goods to the value of nine thousand dollars, on credit, but without the knowledge of B; *Held*, that no partnership existed between A and B, by which the latter could be compelled to pay the debts incurred by the former, for the purchase of goods on credit, without B's knowledge, in violation of the express terms of the partnership, known to the plaintiffs, and in the absence of any fraud or deception practised upon them.

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When no credit is given, and no expectation, originally, of looking to one partner for debts incurred by the other, no recovery against the former can be had.

Where C, the plaintiff, trusted A, one of the defendants, who were partners, in violation of the rule of the partnership, which C ought to have or might have known by inquiry, and in the absence of any deception, he cannot look to B, the other partner, for payment of his debt, because such debt was contracted without the scope of the partnership, and upon the individual liability of A.

Partnership defined to be a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses.

BOOK ACCOUNT. The auditors reported the following facts:

The two defendants were the accredited agents, in Boston, for the New England Protective Union, Devereux for making purchases of goods, and Noyes for selling produce. They entered upon the duties of their respective agencies about the beginning of the year 1853, and continued until 1857, during which period, and after the beginning of 1856, the plaintiff's account accrued.

They were accustomed, respectively, to charge and receive commissions on their sales and purchases, which were fixed by the board of trade at three-quarters of one per cent. on all purchases for subdivisions, and two and one-half per cent. on all sales made for them.

Devereux succeeded one Kaulback as purchasing agent, and at the time purchased of Kaulback a store of goods, and gave him a note for part of the price, signed Devereux & Noyes.

Devereux & Noyes jointly hired a store in Boston, which was occupied for the business of the central agency there, from 1852 to 1857, and also a cellar. Noyes occupied two stories of the store in the produce department and the cellar. The sign over his door was "Wm. P. Noyes," and Devereux had his name over his door, and across the whole building was the sign, "New England Protective Union." Each did the business of his department in his own name. Each hired and controlled the help in his own department.

Devereux, in making purchases generally, and always with the plaintiffs, furnished his own bill heads, debiting the Division in question to himself, which by the vendor were filled up with the list and prices of the articles, and sent to the Division from

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which the order came, and the goods, in case of a credit, were charged to such Division. Devereux then gave his receipt for the bill, and it was charged to him by the seller and by Devereux debited to the Division, according to the bills already forwarded.

But the constitution and by-laws of these associations required in all cases cash payments, and no credit, and this was known to the plaintiffs, and to both defendants, and the practice of posting the bills to Devereux, instead of demanding cash, was in violation of his duty as purchasing agent, whether the credit was long or short.

From 1853 to 1855 Devereux dealt with the subdivisions out of the store in filling orders, and on the 1st of February, 1855, the store was transferred to Noyes, without being moved, and after that Devereux purchased of Noyes to fill orders of the Divisions, the same as of other parties. The stock of goods during all the time was replenished by the use of funds arising in the business of the agency. At the time of the transfer of these goods from Devereux to Noyes no charge was made to Noyes, and no credit given by him on his books for them. Neither Devereux nor Noyes put any funds into the business except what arose from the agency.

From February, 1852, until 1854, Noyes paid over the money received on sale of produce to the cashier in Devereux's department, unless otherwise ordered by the consignors, and he also paid over to the same cashier the avails of consignments outside of the Protective Union, and the amount was by him paid to the consignors. Noyes during this time kept no account at bank.

The larger part of the expenses of both departments, including rents, repairs, fuel, wages to clerks and laborers, insurance on goods, etc., were paid by this same cashier, and no separate accounts kept. Insurance on goods in the store was made in both departments to the defendants jointly. Both parties used coal from the same pile, without any account. The same cashier paid sundry accounts against Noyes between February, 1853, and February, 1855, for oil, paper hangings, soap, tobacco and boots, and for wages of clerks, some of whom made their bills in the name of Devereux & Noyes, but it did not appear that this was known to Noyes.

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Immediately after the appointment of Devereux as purchasing agent it was understood between him and Noyes that the commissions in both departments should be equally divided.

It was then understood by them that the business was to be done for cash and not on credit, according to the rules of the association, and it did not appear that Noyes, at any time during the period of the business, had any knowledge that Devereux had purchased goods in his department on credit, or that the plaintiffs had sold him on time upon the strength of Noyes' credit. But it did appear that Devereux and his clerks, in making purchases of the plaintiffs and others, represented that Noyes was a partner of Devereux, but the plaintiffs never, at any time, made any claim of liability against Noyes until this suit, and there was no evidence that Noyes had any knowledge that he had been represented as Devereux's partner.

All purchases of the plaintiffs by Devereux were on thirty days' time, which they did not regard as on credit. The plaintiffs' claim was about nine thousand dollars.

Upon this report, the county court, at the September Term, 1859,—PIERPOINT, J., presiding,—adjudged, *pro forma*, the defendants to be partners, and rendered judgment for the plaintiffs for the amount of their account, to which the defendants excepted.

M. G. Cobb and Briggs & Nicholson, for the defendants.

E. J. Phelps and Linsley & Prout, for the plaintiffs.

REDFIELD, Ch. J. The general principles of law affecting this case are not much controverted. But there is a most unquestionable conflict in the decisions of the courts in regard to their application to particular cases. It was decided in this court, in *Brigham v. Dana*, 29 Vt. 1, that persons jointly interested in the net profits of an adventure or business, or in the profits as affected by the losses, are partners. And the same point was so ruled by this court much earlier, in the case of *Kellogg v. Griswold*, 12 Vt. 291, and in a recent very able judgment of METCALF, J., in *Fitch v. Harrington*, 8 Law Register, 688. Chief Justice MARSHALL, in *Winship v. The Bank of the United States*,

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5 Peters 529, uses language to the same effect: "One who shares in the profit, although his name be not in the firm, is responsible for all its debts." The distinguished Chief Justice uses another form of expression in this connection, which may be found to have some application possibly to another portion of this case: "A partner, certainly the acting partner, has power to transact the whole business of the firm, **WHATEVER THAT MAY BE**: [but surely nothing beyond that,] and, consequently, to bind his partners to such transactions as entirely as himself."

This seems to bring out the prominent inquiry or inquiries in this case.

I. Was there any credit given in this case to Noyes?

II. If not, were the plaintiffs ignorant, at the time of the credit, of Noyes' true relations to Devereux, and to this purchase on credit?

III. Was there any such connection between the defendants, in any portion of their business, as to create a strict partnership between themselves?

IV. If so, was this credit so far within the range of the contemplated business of the firm, either as originally constituted, or subsequently extended, by the consent or with the knowledge of Noyes, as to render Noyes liable to the plaintiffs?

The law of the case will best be discussed further in connection with the answer to these several inquiries, and the leading facts found in the case.

The facts in this case are very imperfectly and somewhat indefinitely reported. We presume the auditors could have answered some questions, incidentally affecting the case, much more satisfactorily than this court. But as the auditors and the county court have seen fit to send the case here on this report, with a *pro forma* judgment for the plaintiffs, we must dispose of it with the best lights which we can obtain, or remit such questions to the auditors as seem not satisfactorily answered by the report.

1. We understand that while the account was accruing, the plaintiffs were told by Devereux or his clerks that Noyes was a partner. This was while the transaction was passing, and while the plaintiffs might have learned all the facts of the true relations between the defendants. They could certainly have learned, upon

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the slightest inquiry, in the immediate vicinity of their own place of business, how the business of this double agency was conducted. They might probably have learned everything now shown in the case, unless it was the fact that the defendants had agreed to divide the profits of the two agencies equally. And there is nothing in the case to show that even that was intended to be kept secret. It would rather seem from the manner in which the business of the agency was conducted, that even the division of the profits was not kept secret.

2. We understand that the plaintiffs gave the credit to Devereux, took his receipt for the bills, and posted the account to him, and made no claim that Noyes was responsible to them in any way, until the commencement of this suit.

3. Under this state of the case it seems to us the plaintiffs must show that, by contract between the defendants, Devereux was justified in obtaining the goods of the plaintiffs on the credit of Noyes, or that some fraud was practised in the case.

Short of that it does not appear to us the plaintiffs have any just claim to hold Noyes responsible. For they either knew or might readily have learned all the facts in the case, and still after hearing the suggestion that Noyes was a partner, they continued to deal with Devereux as the sole party in interest, to give credit exclusively to him, and to make no claim whatever upon Noyes. Upon what ground then, is it competent for the plaintiffs now to hold Noyes liable?

We readily perceive that, to a certain extent, a partnership did exist between the defendants as to their business in the agency, and probably in the store of goods which was kept in connection with the agency, sometimes by one party and sometimes by the other. But even in this view, we do not understand that the purchases of the plaintiffs came fairly within the range of the copartnership business. The agency certainly did not authorize the purchasing agent to buy on credit. The very fundamental principle of the whole scheme of these protective unions, we understand, is that they shall not buy upon credit, but for money in hand. And although, by a kind of false gloss, the merchants and other traders and business men in Boston, and some other cities, probably, have got up some conventional arrangement

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among themselves by which they agree that a sale or purchase on thirty days' indulgence shall not be regarded as upon credit, but a cash transaction, this certainly does not make it so in fact. If any term of credit is not credit, then no term of credit is credit, and the very import of the term is abolished and expunged, and the thing becomes impossible. We know that usage and custom will accomplish almost anything except impossibilities. But when it proposes to change the import of language it does not thereby change the nature of things. This same absurd attempt to convert a credit of thirty days into no credit at all may be turned against the plaintiffs as well as in their favor. If thirty days' indulgence is cash in hand, then, of course, the plaintiffs gave no credit to any one, and have no claim against any one, because, forsooth, a credit of thirty days is cash in hand, and by consequence no credit was given, and no debt was created, the plaintiffs were paid for their goods at the time of delivery, and have no occasion and no claim to maintain this action against any one.

This court held this pretended custom void in *Catlin v. Smith*, 24 Vt. 85. We have no occasion to say more about it. It was undoubtedly a credit, but, as we have before said, clearly a credit to Devereux and not to Noyes.

We think, too, it is equally obvious that the plaintiffs must be regarded as having knowledge, either in fact of the whole transaction and of the true relation between the defendants as to the manner of transacting the business of the double agency, or else that they had such knowledge as was ample for putting them upon inquiry, and that such inquiry would have resulted in the discovery of all the facts substantially as they existed. This being so, the plaintiffs are affected with the knowledge of all the facts which existed, and which upon reasonable inquiry might have been ascertained. So that in this view of the case the plaintiffs must be regarded as having elected to give credit to Devereux alone, treating the credit as so short and so much in the nature of ready pay, that they probably regarded the responsibility of Devereux as sufficient.

But, in addition to this, it seems to us that from the fact that the plaintiffs appear to have been one of the principal houses

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where the purchasing agent of this New England Protective Union dealt, (we infer this from the amount of business done with them, and the fact that it extended over a considerable period,) from these facts, then, and the general notoriety of the no credit basis of these protective unions, it seems to us fair to conclude that the plaintiffs must be affected with notice in fact that this purchasing agent was to purchase only for ready pay, and that he was not therefore justified in obtaining credit; and that although we recognize the defendants as partners, to a limited extent, that is, so far as the agency and the store are concerned, as we probably should be inclined to do, it will not entitle the plaintiffs to recover of Noyes.

The case in this last view will come within the principle of those cases where the party giving credit to one partner, knowing there are others in the same house, knows, also, that the credit is not justified by the terms of the association and the expectation of the other partners. As, for instance, where there are two houses having some members in common and others distinct. One who gives credit to the active partner, in one house, for goods going to that house, cannot hold the members of the other house responsible. Or, when a partnership exists where, by articles of association, the business is to be transacted without credit, and this is known to one who gives credit to one of the partners, or even to the whole house, upon the representation of one member that it will be paid shortly, the creditor knowing at the same time, that, by the articles of association, and the expectation of the other partners, no credit is to be obtained, such person cannot recover of the other partners. This is familiar law upon both points; Story on Part. sec. 128, *et seq.* Here it is laid down as clear law, that if the person dealing with one partner, although the business come fairly within the range of the partnership, yet if the creditor knows, at the time of giving credit, that the articles of association do not justify the sale on credit, or not upon the credit of all the partners, and that the other partners do not expect to be liable for any such contract, and are not to become liable, as between themselves, he cannot bind them, notwithstanding the creditor may have an implicit expectation that he shall thereby obtain the responsibility of the firm, and may even make

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his contract in the name of the partnership. This point was expressly decided by this court in *Hastings v. Hopkinson*, 28 Vt. 108.

So, also, in regard to the other point it seems equally well settled, that if the contract is made with one partner and in his name alone, the creditor knowing of the partnership at the time, if it turns out that the partner was not justified in making the contract on behalf of the firm, they are not responsible, and this is so, notwithstanding the creditor might have entertained an implicit expectation that the firm would consent to be liable to him, or were in fact liable; Story on Part. sec. 154; Collyer on Part. B. 3, ch. L. sec. 2.

If, then, we assume that a partnership *quoad* the agency, and the store of goods, did exist between the defendants, and this is the most which can be claimed, as the utmost which the testimony tends to prove, it is still obvious that as to the agency there was nothing, either in the constitution and by-laws of the union, or in any presumed understanding between these partners growing out of the previous mode of transacting the business, which would justify Devereux in purchasing goods for the Divisions upon the credit of Noyes. So far as Devereux and Noyes were concerned, very likely Devereux, from the fact of being a partner of Noyes, might do this to the extent of the partnership business, so far as third persons were concerned, who were wholly ignorant of the extent of his authority, and so might purchase of those who did not understand the laws of this agency and the extent of the connection between the defendants, and do this on the credit of the firm. But that is not the case of the plaintiffs.

They have such knowledge upon the subject that they should be content to stand upon the actual authority of Devereux, as between himself and Noyes. And here it does not seem to us, as the case stands in this court, there is any good ground to claim that Devereux had any express or reasonably implied authority to bind Noyes to this credit.

It does not appear to us that the plaintiffs had any such belief or expectation at the time, or, if they had they certainly elected to give credit exclusively to Devereux, and that would release Noyes from all legal or moral obligation in the matter.

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We do not perceive that any such facts were kept from the knowledge or possible apprehension and discovery of the plaintiffs as will justify this court in saying that a virtual fraud was thereby practised upon them, and thus enabled them to go against Noyes, as well as Devereux, upon that ground.

We feel compelled, therefore, as the case stands before us, and with the best lights we can obtain from surrounding circumstances, to say that it seems to us the plaintiffs have not shown any satisfactory grounds for claiming judgment against Noyes.

The result of our investigations has been to answer the inquiries we at first proposed in such a manner as not to entitle the plaintiffs to recover of Noyes. It will have been perceived that as we construe the facts found by the auditors :

1. There was no fraud or deception practised upon the plaintiffs. They knew or had the means of learning all the facts in the case important to their interest.

2. They gave no credit to Noyes, and had no expectation originally of looking to him for pay.

3. The relation of partnership, if any, which existed between Devereux and Noyes, only extended to the store of goods and the conduct of the agency, according to its legitimate terms.

4. The dealings of the plaintiffs, so far as any credit was given to Noyes, did not come fairly within the scope of the partnership, as in fact made or as understood by the plaintiffs.

5. The plaintiffs' account having accrued neither in supplying the store nor in supplying the purchasing agent, in buying according to his duty and the terms of the partnership, they cannot claim to hold Noyes by the terms of the partnership.

6. They cannot claim to hold him on the ground that the scope of the partnership was enlarged by his acquiescence so as to allow Devereux to buy for the Division on his credit, or that of the firm, since the plaintiffs were aware that this credit was without the limits of the legitimate business, both of the agency and the partnership, and were themselves as much in fault as any one, in suffering the extension, and far more so than Noyes, and it was evidently suffered by the plaintiffs with the full knowledge and expectation that they could look only to Devereux.

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As we construe the facts reported, and we see no reason to question their correctness, the plaintiffs have no claim either in law or justice to now hold Noyes responsible for their claim.

We must, therefore, reverse the judgment, and enter up final judgment for the defendants.

HANNAH CARRUTH v. JOHN TIGHE.*Justice of the peace. Appeal. Amendment.*

While a justice of the peace is alive and continues to reside in the county for which he was appointed, he is the proper certifying officer of his own records, although he may be out of office.

The defendant appealed from the judgment of a justice, but neglected to enter his appeal. The plaintiff, at the next term of the county court following the appeal, caused a copy of the justice's record, certified by the county clerk, (the justice, though out of office, still continuing to reside in the same county), to be entered for affirmance. The defendant moved to dismiss the suit on account of the defective mode of certifying the records and consequent want of jurisdiction. *Held*, that it was not error for the county court, pending this motion, to continue the cause to enable the plaintiff to file a properly certified copy of the record, and upon its being filed, to proceed and try the cause upon its merits.

This cause purported to be an appeal by the defendant from a judgment rendered by Charles L. Williams, Esq., a justice of the peace for Rutland county, on the first of November, 1858.

The suit was not entered in the county court by the defendant, but at the March Term, 1859, of that court the plaintiff filed therein a certain written instrument, appearing to be a copy of the original writ and officer's return, and of certain entries thereon by the said justice of the peace, showing a judgment by him in favor of the plaintiff and an appeal by the defendant with a certificate thereto attached, signed by the clerk of the Rutland county court, to the effect that the said Williams, the subscribing authority to such writ and minutes, had resigned his office as justice of the peace subsequent to the rendition of such judgment,

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and that the said instrument was a true transcript of such writ and proceedings as then remaining in the county clerk's office.

Upon the entry of this instrument and certificate in court, the defendant moved to dismiss the suit on the ground that the papers filed by the plaintiff did not legally show that any judgment had been rendered or any appeal taken therefrom, and because it was apparent upon the face that the court had no jurisdiction of the suit.

The county court, at the March Term, 1859,—PIERPOINT, J., presiding,—overruled the motion to dismiss, and ordered that the cause be continued till the next term of the court, and that the plaintiff be allowed to file amended copies of the record of the judgment and appeal, to which the defendant excepted.

It was conceded upon the hearing upon the motion to dismiss that justice Williams then resided in Rutland, and had resided there ever since the rendition of the judgment in question.

At the September Term, 1859, the plaintiff filed a copy of the record of the judgment and appeal in question, duly certified in all respects, to the filing of which the defendant objected, but the court overruled the objection. The case was then tried upon its merits under objection from the defendant to the jurisdiction of the court, for the cause above stated, and judgment was rendered for the plaintiff.

To the decision of the court, permitting such copy of the record to be filed, as well as to any trial of the cause upon its merits, the defendant excepted.

H. Allen, for the defendant.

— — — — —, for the plaintiff.

POLAND, J. The copies first filed by the plaintiff for the purpose of procuring an affirmance of the judgment of the justice, were undoubtedly defective because not properly certified by the justice.

The county clerk is not made a certifying officer of justices' records, except when the justice has removed from the county or has died. While the justice is alive and continues to reside in

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the county, he is the proper certifying officer of his own records, although he may be out of office; Comp. Stat., p. 239, section 77 to 80.

The decision of the county court in overruling the defendant's motion to dismiss the action, if the same is to be regarded as deciding that such copy was legal and regularly certified, was improper; but taking the whole decision together it is plain that this was not the case. The court refused merely to dismiss the action at that time, and granted leave to the plaintiff to procure amended copies, and continued the cause to enable her to do so. The real question, therefore, is, had the county court power to entertain the cause upon such copies as were filed, and continue the cause for the purpose of allowing properly certified copies to be procured and filed.

The defendant claims that the copies were so defective that the court had no jurisdiction whatever of the action, and therefore could not continue it or take any cognizance of it.

If this proposition be sound, then the course of the county court was erroneous, for if the court had no jurisdiction of the case, they could not properly continue it, or take any action upon it whatever. It is not claimed but that the action was one of which the county court had proper appellate jurisdiction, nor that the same had not in fact been properly appealed from the judgment of the justice, but the objection rests solely upon the defect in the copies filed. The question then is to be considered as to the effect of a judgment rendered by the court in that position of the case, if the defendant had not appeared and interposed any objection; or if the court had decided that the copies produced were regular and legal, and rendered a judgment for the plaintiff, to which the defendant took no exception, and allowed it to become final. Would that judgment have been void? Clearly it would if the court had no jurisdiction of the case, for no valid judgment can be rendered where the court has no jurisdiction.

But it does not follow because the process is defective, and defective in such vital particulars, that the court have no proper power to allow the same to be amended, that they have no jurisdiction of the cause, and therefore can render no legal judgment. In the case of *Allen v. Huntington et al.*, 2 Aik. 249, it was

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decided that in an action where the statute required the justice to enter upon the writ a minute of the day when he signed the same, and provided that if this was not done, the writ should be void, and this was not done, still the judgment was good. In *Peck v. Smith et al.*, 3 Vt. 265, it was held that the omission of the recognizance in a writ was a fatal defect, and that the court had no power to allow one to be inserted by way of amendment; yet that the court having allowed it, no objection could be made to the judgment.

So it has been held in several cases, that when a justice signs a blank authorization upon the back of a writ, which is afterwards filled up by the party, or any person except the justice, such authorization is wholly void, and confers no legal authority whatever upon the person whose name is thus inserted, and that if he take property or make an arrest under his process his act is wholly without legal justification, and he is liable as a trespasser. Yet it has been held that where a writ was served in this manner, the judgment rendered in the action was not void; *Kellogg ex parte*, 6 Vt. 509; *Kelley v. Paris*, 10 Vt. 261; *Ross v. Fuller et al.*, 12 Vt. 265. So it has been held under our statute against bastardy, which expressly requires the justice to whom the complaint is made, to return to the county court the original complaint and warrant, with his record of his doings thereon, that when the justice returned copies instead of the originals, after a trial and verdict no objection could be raised that the originals were not returned; *Ramo v. Wilson*, 24 Vt. 517. In analogy to these decisions, and upon general principles, we are of opinion that the court had jurisdiction of the cause, and that if they had overruled the defendant's motion and rendered a judgment upon the defective copies, the same would not have been void. The copies filed purported to be copies of the original writ and service, and entries showing a judgment and an appeal, but were not certified as the statute requires; they were insufficient and defective, but if they were sufficient to satisfy the court that in fact there was such a cause duly appealed, the court might entertain it and allow perfect copies to be filed. We do not regard it as indispensable to the entertaining the cause at all that the party must produce duly certified copies, and that if by some mischance the party should fail to procure his copies, he

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might satisfy the court by the production of the original files or record, that he had a cause properly appealed upon them; or if the justice should refuse to give copies, the party might satisfy the court by proof of the fact, so that he might enter his cause, so that he could take proceedings to compel the justice to give him copies.

These views seem to be supported by what has been decided in relation to appeals from orders of removal of paupers. The statute provides that the town to which the order of removal is made, may appeal therefrom to the next term of the county court. It is not in terms provided that the justices shall give any copies to the party appealing, or that the party shall enter any copies of the order and appeal in court, but it is clear that there must be something in court to show the proceedings, and the uniform and established practice has always been to procure certified copies from the justices, and file them in court, in precisely the same manner as in appeals from justices in ordinary suits, and this is now probably understood to be the only proper mode. In the case of *Orange v. Bill et al.*, 29 Vt. 442, it appears that an order of removal was made by the defendants as justices, of a pauper from Topsham to Orange. The agent of Orange applied to the justices for an appeal, and for copies, but did not procure the copies because he could not wait for them to be made out. At the next term the appeal was entered in court and continued, but no copies filed, and at the next term a motion was filed by Topsham to dismiss the appeal for want of copies. The case was then continued to enable copies to be obtained, but on application to the justices they refused to certify that any appeal was taken. Thereupon the town of Orange applied to the supreme court for a writ of *mandamus* against the justices to compel them to duly certify the appeal, which the court upon a hearing ordered to issue.

Probably the strongest authority to be found in our reports in favor of the defendant's view of this case, is *Goodenow & Dix v. Stafford*, 27 Vt. 437. That was an *audita querela* to set aside a judgment of affirmance obtained by the defendant in the county court, in a suit in his favor against Goodenow & Dix, brought before a justice and appealed by Goodenow & Dix to the county court.

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They employed an attorney to enter their appeal in the county court, but he was not furnished with any copies from the justice. The clerk, by direction of the attorney, entered upon the docket the case of *Stafford v. Goodenow*, but filed no copies whatever, nor was any evidence filed or any application whatever made to the court on the subject of procuring copies. No appearance being entered on the docket for Goodenow, the defendant's attorney had a judgment of nonsuit entered. At the same term the attorney of Stafford filed duly certified copies of the appeal and a complaint for an affirmance of the judgment, and the same was affirmed by the county court. This judgment was sought to be set aside because, the suit having been entered by the appellants, the appellee had no right to enter it for affirmance under the statute, and that the judgment of affirmance was irregular. It was held that the appeal was not entered by the appellants. That this decision was correct we do not doubt. The mere entering the names of the parties, (and that incorrectly,) on the docket, without any copies and without any evidence whatever that there had been an appeal, or even that there was ever any such cause, and without any application to the court, could not be considered as any proper entry of the appeal.

The remark of BENNETT, J., in delivering the opinion in that case, that until copies were filed the court had no jurisdiction of the action, was correct enough as applied to the facts of that case, but we think could not well be sustained as applied to all cases. There is a very great difference between judgments rendered upon insufficient and defective process and proceedings, and judgments where there is no process or antecedent proceedings before the court upon which they can act. The proceedings of the county courts in this case we believe to be in strict conformity to the well established practice of the courts in this State, in allowing copies of appeal to be amended or new and perfect ones to be supplied. Any other practice would be very inconvenient and often produce great injustice, as copies of appeal furnished by justices are so often imperfect and the cases so frequent when they cannot be readily perfected. If it were to be held that duly and regularly certified copies must in all cases be procured and filed during the term the appeal is entered, or the appellant sub-

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mit to an affirmance of the judgment, it must often happen that parties would be deprived virtually of all benefit of the right of appeal.

As the case is reported upon the exceptions, we are not sure but that when the defendant entered his appearance, he entered as the appellant, so that the duty was upon him to have furnished the copies. When a case is entered by the appellee, it is merely to procure an affirmance of the judgment, and not for a trial. In such case doubtless the appellant ought to be allowed to enter to oppose the affirmance if he chooses, but unless he enters the case as appellant, he is not entitled to have any trial of the case upon the merits, only to show cause why the judgment should not be affirmed. When the case is entered by the appellee for affirmance, the appellant is always allowed upon terms to enter as appellant, and have the case tried, but it is only by special leave from the court.

In this case it appears that after the amended copies were filed the case was tried upon the merits, and this could only be done properly by the entry of the appeal by the appellant. It does not appear from the exceptions that he ever obtained leave to enter as appellant, or that he ever did so unless his entering his appearance to the action originally was in that character. But it is not necessary to decide the case upon this ground. We are of opinion that the court correctly refused to dismiss the case, at the first term, and that the leave granted to procure new copies was a matter resting in the proper legal discretion of the court, which cannot be revised.

The judgment is affirmed.

Foot & Hodges v. R. & W. R. R. Co.

FOOT & HODGES v. THE RUTLAND AND WHITEHALL RAILROAD COMPANY.*Corporations. Contract. Book account. Auditor.*

S. contracted with the defendants to build their railroad and bear all the expenses of litigation growing out of its construction, and it was agreed that he might use the defendants' name in all necessary litigation. H, one of the defendants' directors, of which there were five, was also the agent of S., in relation to the execution of this contract. The plaintiffs not being aware of any agreement that S. was to bear the whole expense of the litigation, by the employment of H., rendered professional services, as attorneys, in a suit against S. by a rival corporation, in which, however, the defendants were really interested, and charged their services to the defendants. This charge constituted the first item of the plaintiffs' account. The remaining items were for professional services rendered in a suit brought by the plaintiffs in favor of H. against the same rival corporation, which suit was brought after consultation by the plaintiffs with H. and the two other managing directors of the defendants, and with their approval, but nothing was said as to whom charges were to be made therefor. The object of this suit was to protect the defendants' interests, but the two other directors, participating with H. in the consultation with the plaintiffs, which resulted in bringing the suit, though aware of this fact, still supposed that the plaintiffs' services were to be rendered entirely upon the credit of S. These services were originally charged by the plaintiffs to H. No action was ever taken by the board of the defendants' directors in regard to the employment of counsel for the defendants. The auditor allowed the whole of the plaintiffs' account, and reported the foregoing facts in regard to it; *Held*, that as to the first item, the plaintiffs were authorized to consider themselves employed by the defendants, and to charge it to them, as they did; and in regard to the remaining items, the supreme court held that the same authority existed, and notwithstanding the original charge of them to H., construed the report as intending to state that the services were rendered on the credit of the defendants, and therefore rendered judgment for the plaintiffs for their whole account.

Corporations are bound by the acts of their servants and agents, within the ordinary line of their duty, without any formal vote conferring such authority; and the action of their directors, though acting separately, if in the usual sphere of directors, is binding upon the corporation.

BOOK ACCOUNT. The auditor reported that the plaintiffs were attorneys, and that their account was for professional services and attendant expenses rendered and incurred under the following circumstances:

In 1849, shortly after the defendants organized as a corpora-

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mit to an affirmance of the judgment, it must often happen that parties would be deprived virtually of all benefit of the right of appeal.

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BOOK ACCOUNT. The auditor reported that the plaintiffs were attorneys, and that their account was for professional services and attendant expenses rendered and incurred under the following circumstances:

In 1849, shortly after the defendants organized as a corpora-

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tion, they entered into a contract with R. & G. L. Schuyler, by which the latter agreed to construct the whole line of the defendants' railroad, at a certain price per mile, and it was provided therein that the Schuylers should bear the whole expense of constructing such railroad, including both land damages and all law suits and necessary legal proceedings incident thereto, and that they should have the right, at their own cost, to use the name of the defendants in all legal proceedings in any way connected with the building of such railroad and the protection of its interests.

The board of directors of the Rutland and Whitehall Railroad Company consisted of five members, only three of whom were citizens of Vermont and participated actively in the management of the affairs of the road, viz: Arunah W. Hyde, Benjamin F. Langdon and William C. Kittredge. These three persons were directors from the organization of the corporation until after the last item of the plaintiffs' account accrued. Hyde was also the agent of the Schuylers during the same period, in all matters relating to their contract with the defendants, already referred to. It appeared that Hyde acted in the name of the defendants, with the knowledge of their directors, in settling the land damages, and that he did the greater part of the business of that character.

At the October Term, 1849, of the United States circuit court in this State, a suit in chancery was commenced in favor of the Rutland and Washington Railroad Company, a rival corporation owning a road nearly parallel to that of the defendants, against R. & G. L. Schuyler, for the purpose of procuring an injunction against the construction of a certain portion of the defendants' railroad. The plaintiffs were retained by Hyde at that term as solicitors to defend that action, but it did not appear that at the time of their employment anything was said respecting the party to whom the charge for the plaintiffs' services was to be made. The first item in the plaintiffs' account was the only charge relating to this suit, and was the only item originally charged to the defendants by the plaintiffs.

In 1850, while the contractors on the Rutland and Washington Railroad and the Rutland and Whitehall Railroad were both at work constructing their respective roads near the village of Cas-

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tleton, the former were about to turn the courses of certain streams in that neighborhood, in such a manner as to occasion apprehensions, among those interested in building the latter road, of serious and permanent injury to their road. Hodges, one of the plaintiffs, went from Rutland to Castleton in compliance with a request by telegraph, sent him by Langdon or Hyde, which message was sent with the approval of Kittredge, and there had a consultation with Langdon and Hyde respecting the proceedings which had occasioned these apprehensions, and the proper method of stopping them. Hodges advised that a suit in chancery should be commenced in the name of Hyde (who was the owner of the land through which the water courses were proposed to be turned) against the Rutland and Washington Railroad Company for the purpose of obtaining an injunction against such change of their channels, and, as the result of this consultation, Hodges was directed by Hyde to commence such a suit, which was accordingly done, and for the plaintiffs' services in the prosecution thereof, all the remaining items of their account accrued, except the second item, which was for time and expenses in going to Castleton to attend the above mentioned consultation.

The only purpose for which the suit in chancery in the name of Hyde against the Rutland and Washington Railroad Company was commenced, was incidentally to protect and defend the interests of the defendants, and Hyde, Langdon and Kittredge were each cognizant of this fact at and from the time of the commencement of the suit. The board of directors of the Rutland and Whitehall Railroad Company never gave any express authority to Hyde, or any other person, to employ any counsel on account of the company in any case, and the subject of the employment of counsel was never before the board at any of their meetings. Langdon and Kittredge, at the time of the plaintiffs' employment by Hyde to bring the chancery suit in the latter's favor, understood that the plaintiffs were employed on the account of the Schuylers, and never contemplated the incurring of any liability on the part of the defendants, by reason of such employment. But Hodges did not know at the time of his consultation with Hyde and Langdon, that either of them was acting in any other capacity than as directors of the defendants, and while their

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account was accruing the plaintiffs were not aware of the terms of the contract between the Schuylers and the defendants, above set forth, and had no reason to suppose that the Schuylers were to be liable for the expenses of the legal proceedings arising out of the construction of the defendants' road.

The services performed by the plaintiffs and charged in their account presented against the defendants, were in furtherance of the interests and objects of the defendants and for their benefit.

The first item of the plaintiffs' account was charged by them originally to the defendants; the second item to Hyde, Fuller & Hyde, of which firm Arunah W. Hyde was a member, and the remainder of the account to Hyde.

Upon these facts the auditor reported that the defendants were indebted to the plaintiffs in the amount of their account presented before him, with interest.

In the county court the defendants objected to the acceptance of this report, and claimed that upon the facts reported the judgment should be for the defendants, but the court, at the March Term, 1859,—PIERPOINT, J., presiding,—rendered judgment, *pro forma*, for the plaintiffs, for the amount reported by the auditor, to which the defendants excepted.

— — — — —, for the defendants.

S. H. Hodges, for the plaintiffs.

ALDIS J. The questions which are presented to us for consideration in this case arise upon an auditor's report. The auditor has allowed all the items of the plaintiffs' account as charged, and then proceeds to set forth the facts which he finds proved in the case, without in terms submitting any question of law to the court. It is claimed that the facts as found do not justify the conclusion of the auditor in this respect, viz: that no privity of contract is established between the plaintiffs and the defendants.

It appears that by a contract between the defendants and R. & G. L. Schuyler, the Schuylers were to build the defendants' road and to incur all expenses of the character which compose the plaintiffs' account; that one Hyde was the agent of the Schuy-

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lers, and authorized by them to incur all necessary legal expenses in the construction of the road, and that Hyde used the name of the railroad company with the knowledge of the directors; that the plaintiffs were employed by Hyde as to the first item in their account, and as to the remaining items by Hyde, who was one of the directors of the defendants, and by two of the other five directors, the two other directors supposing, though nothing was said to that effect, that the plaintiffs were to look to the Schuylers for their pay. There never was any action of the defendants' board of directors employing the plaintiffs, or authorizing Hyde to act for them; but the board did authorize the Schuylers to do all acts in the construction of the road which the defendants might do, and to use the name of the defendants in all matters of business, when necessary.

I. It has been frequently settled, and needs no citation of authorities to show, that corporations are bound by the acts of servants and agents in their employment, and within their ordinary line of duty, without any formal vote conferring such authority; and that the action of directors, though acting separately, if in the usual sphere of directors, binds the company.

In this case the action of three of the five directors in employing the plaintiffs to perform the services charged, (which includes the whole of the plaintiffs' account except the first charge,) would bind the defendants, unless it was understood by the plaintiffs that they were to charge for their services, not the corporation, but some other person, either the Schuylers or Hyde.

So the employment by Hyde as to the first item would, *prima facie*, bind the company, as he was apparently acting as their agent in all such business. The charge for the first item was for professional services in defending a suit brought by the Rutland and Washington Railroad Company against the Schuylers, but in which the defendants were the real, though the Schuylers were the nominal parties. This charge was originally made to the defendants, and not to the Schuylers. If it had appeared in the case that the plaintiffs, when they rendered these services, knew that the Schuylers were to bear the expenses of all such legal proceedings, then clearly the plaintiffs could not recover for their services so rendered. But the report shows that they had

no such knowledge, but on the contrary, their whole account accrued in entire ignorance of this agreement between the Schuylers and the defendants.

As this charge was originally made to the defendants, was for services in business connected with building their road, and was rendered at the request of Hyde, who was one of their directors, and who was also their ostensible agent, through the Schuylers, for all such business, we think that the plaintiffs having no knowledge of the agreement by which the Schuylers were to bear all such expenses, were authorized to consider themselves as employed by the defendants, and to charge these fees, as they did, to the defendants.

As to the remainder of the account, so far as the question arises as to the proof of employment, apparently by the railroad company, the case is still stronger for the plaintiffs, for as to these services they were employed by Hyde and two other directors, being a majority of the board, and no intimation given that they were to look to any other person than the defendants. So as to the business in which they were so employed, the case shows, to quote its language, "that the *only* purpose for which the suit was commenced was incidentally to protect and defend the interests of the defendants, and that the three directors who employed the plaintiffs were each cognizant of this fact." So far, the right to charge the defendants is clear, and we should have found no difficulty with the case if another fact had not been stated by the auditor, viz: that the plaintiffs originally charged these items of the account to Hyde, and not to the defendants. Such a charge standing alone and unexplained, would show that in fact the plaintiffs rendered their services upon the credit of Hyde, and not upon the credit of the company. Upon this vital point the auditor has not in express terms stated upon whose credit he finds the services were rendered. The entry on the plaintiffs' book, as we have already said, would show it was upon Hyde's credit. On the other hand, the facts, that the services were not for the benefit of Hyde, but solely for the benefit of the company, and upon consultation with and apparently upon employment by a majority of the directors, would tend strongly to rebut that presumption. We have, however, with

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considerable hesitation, come to the conclusion to construe the report as intending to state that the credit was given to the company. We do so, because, first, the general finding of the auditor is for the plaintiffs upon the whole account, and it is reasonable to give that construction to this report which sustains the finding; and, secondly, because we cannot perceive how the auditor could have come to this conclusion on behalf of the plaintiffs, unless he had found the credit given to the defendants.

The judgment is therefore affirmed.

THE BUTLAND AND WASHINGTON RAILROAD COMPANY v. THE
BANK OF MIDDLEBURY.

Trover, Effect of return of property sued for to plaintiffs, and the power of courts to make an order to that effect. Railroad bonds. Damages.

The county court has the power, in an action of trover, to permit by order the return of the property alleged to have been converted, in mitigation of damages, and, on payment of costs by the defendant, to order that the plaintiff shall thereafter proceed at his peril as to subsequent costs.

This power, though its exercise in proper cases is discretionary with the Court, can not be used when the defendant has acted wilfully in taking or keeping the property, when the property has deteriorated, or when its value is in dispute.

The mere fact, however, that the plaintiff claims damages, either general or special, beyond the value of the property, does not render it improper to make such an order.

The plaintiffs, a railroad company, deposited with the defendants certain of the former's mortgage bonds, payable to bearer, to be held by the defendants, upon the performance of a certain condition, for a specified purpose. This condition was not performed, but the defendants, in good faith, claimed to hold the bonds for another purpose, and refused to surrender them on demand. These bonds were never worth above par, but, after their conversion by the defendants, they greatly depreciated in market value. The plaintiffs brought trover for the bonds, alleging in their declaration in addi-

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tion to general damage, that they had, by the conversion, been deprived of the means of negotiating them, and had been put to expense in raising funds to relieve their property from attachment. Before trial the defendants offered in Court to deliver the bonds to the plaintiffs and pay them their costs already accrued and the County Court made an order allowing them to bring such bonds and costs into Court for the plaintiffs and that if the latter refused to receive them they must proceed at their peril as to subsequent costs, unless they succeeded in recovering more than nominal damages above the face of the bonds. *Held*, that the case under such circumstances, was one proper for the exercise of the power of the Court to make such an order in their discretion.

Held, also, the defendants having complied with this order, and the plaintiffs having refused to accept such compliance as a satisfaction of the suit, but having proceeded to trial, and proved no facts materially different from those appearing when the order was granted, that they were entitled to recover only nominal damages.

TROVER for the conversion of ten of the mortgage bonds issued by the plaintiffs for one thousand dollars each, dated October 1st, 1852, and payable to one Eastman, or bearer, October 1st, 1867, with interest payable semi-annually, at seven per cent. per annum. The writ was returnable at the March Term, 1855, and the declaration consisted of three counts, the first of which claimed merely a general damage of twelve thousand dollars. The second count alleged that the plaintiffs had been, by the conversion complained of, deprived of all benefit which would have accrued to them by the bonds in question, and which they would otherwise have acquired from their use and negotiation, viz: to the full amount thereof. The third count contained a similar averment of damage to that in the second count, and also alleged that by means of such conversion the plaintiffs had been put to great expense in raising funds for their necessary use, to wit: the sum of fifteen thousand dollars to relieve their property from attachment and sale.

The defendants pleaded the general issue and the cause was partially tried by jury at the September Term, 1855, and continued. At the March Term, 1857, a full trial by jury was had and a verdict recovered by the plaintiffs for nine thousand dollars, and the cause was reviewed by the defendants. After this verdict and review, the defendants, for the first time in the case, offered to restore the bonds in question to the plaintiffs, and to

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pay them their costs already accrued, and moved for a rule that the plaintiffs' costs be taxed, and that upon the surrender of the bonds by the defendants in court and the payment of the plaintiffs' costs all further proceedings on the part of the plaintiffs be perpetually stayed.

Upon this motion a hearing was had, KITTRIDGE, J., presiding, and each party introduced evidence in the form of affidavits substantially the same as the matter proved and offered to be proved at the subsequent trial of the cause, as hereinafter detailed. The county court ordered that the plaintiffs' costs be taxed and that the defendants have leave to deliver into court the ten bonds in question, and also to bring into court the amount of the plaintiffs' costs, and that if the plaintiffs would accept such bonds and costs in discharge of the action, all further proceedings in the cause should be stayed; but that, if the plaintiffs should refuse to accept them in discharge of the action, and should proceed to the trial of the issue in the cause, the damages which should be recovered by them should be subject to be reduced by the amount of the *prima facie* liability of the plaintiffs for the payment of the money specified in the bonds; and in case the damages recovered by the plaintiffs should not after being so reduced amount to more than nominal damages, the plaintiffs should recover costs against the defendants, incurred subsequent to the delivery and payment into court of the bonds and costs as above mentioned, and the defendants should recover their costs incurred during the same term. To this order the plaintiffs excepted.

The defendants at the same term complied with this order by bringing the bonds into court and depositing them with the clerk, together with the plaintiffs' costs up to that time; but the plaintiffs refused to receive them in discharge of the suit, and they remained in the clerk's custody. The cause was continued from term to term until the September Term, 1859, when it was again tried on the merits by jury, ALDIS, J., presiding.

The testimony of the plaintiffs tended to show that in 1853 the plaintiffs were indebted to the defendants in two drafts of \$5000 each, the first payable in September, the second in October, 1853; that the defendants, in November, 1853, com-

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menced a suit upon the drafts and attached the property of the plaintiffs; that the plaintiffs applied to the defendants to discontinue the suit, and to renew the discount, and proposed to the defendants to substitute new drafts for the old ones, and to deposit with the defendants ten second mortgage bonds of the plaintiffs of \$1000 each (being the same described in the declaration,) for the defendants to hold as collateral security for such new drafts; that upon the expectation that the defendants would accept such proposal, the plaintiffs, on the 15th December, 1853, sent to the defendants the ten bonds; that these bonds were deposited with the defendants merely as collateral security for the new drafts which the plaintiffs proposed to substitute for the old ones; that the new drafts so intended for the renewal of the old were sent to the defendants on the 31st January, 1854; that the defendants finally refused to renew the old debt, or to take the new drafts in place of the old ones, or to discontinue the suit commenced upon the old drafts; and that before the commencement of this action the plaintiffs demanded the bonds of the defendants, who refused to surrender them: that the defendants, pursuant to the order of court, at the September Term, 1857, already recited, surrendered into court, for the use and benefit of the plaintiffs, the ten mortgage bonds described in the declaration, and left them with the clerk of the court for the plaintiffs; that the bonds had ever since remained, and still were, in the custody of the clerk, (and they were, at the request of the defendants, on the trial produced in court by the clerk to be delivered to the plaintiffs,) that the defendants, at the September Term, 1857, had procured the plaintiffs' costs up to that time to be taxed under the order of the court, and had, at the same term, left the amount of the costs so taxed with the clerk of the court, for the plaintiffs; and that the plaintiffs, both at that term, and ever since, had wholly refused to accept both the bonds and costs.

The defendants introduced testimony to show that they supposed in good faith that the bonds were deposited with them as collateral security for their claims against the plaintiffs then overdue, and that it was for this reason they declined restoring them to the plaintiffs until the latter had cancelled their obligations to the plaintiffs.

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The defendants insisted that the plaintiffs were entitled to recover only nominal damages, and admitted that upon the plaintiffs' showing, and upon the order and the surrender of the bonds, the plaintiffs were entitled to nominal damages, but without costs.

The plaintiffs insisted, first, that they were entitled to recover the amount due upon the bonds, or if not that amount, then, secondly, the value of the bonds, as they could have been sold in the market for cash at the time of the conversion; and for this purpose offered to prove that at the time of the conversion the bonds were worth, and could have been sold for cash, at prices varying from ninety cents on the dollar to nearly par, but did not claim that at the time of conversion, or since, they had been worth more than their par value. The defendants objected to the admission of this evidence.

The court held that by virtue of the former order of the court, and by the delivery and production of the bonds in court for the use of the plaintiffs, the plaintiffs, on account of their liability to pay the bonds, could recover as damages only a nominal sum, and excluded the evidence offered by the plaintiffs, to which decision the plaintiffs excepted.

The plaintiffs then offered to show that at the time of the conversion they were indebted to the Bank of Ogdensburg in about the sum of twenty thousand dollars; that the Bank of Ogdensburg had agreed to take second mortgage bonds of the plaintiffs in payment upon the debt, and that they could then have used these bonds to pay upon their debt to that bank; that the plaintiffs applied to the defendants for these bonds, and told them of the use to which they wished to apply them, but the defendants refused to deliver them to the plaintiffs; that these bonds were the only ones within the control of the plaintiffs which they could procure; that the Bank of Ogdensburg commenced a suit against the plaintiffs upon their debt, and attached the plaintiffs' property, and that the plaintiffs had been obliged to pay out, nearly five thousand dollars over and above their debt, to the Bank of Ogdensburg in order to relieve their property from the attachment. To the admission of this evidence the defendants, objected, and it was excluded by the court.

The plaintiffs also offered to show that they had necessarily

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expended for counsel fees and other expenses of this suit the sum of one thousand dollars, before the defendants offered to surrender the bonds into court. This evidence was also objected to by the defendants and excluded by the court.

The plaintiffs also offered to show that they could not build and carry on their railroad without making a mortgage to raise money; that the mortgage by which these bonds were secured covered all the real and personal estate of the company, and while it was outstanding the plaintiffs could not raise money upon a subsequent mortgage; that the use of these ten bonds was valuable to the plaintiffs in raising money to prosecute their business under their charter, and that the plaintiffs, for want of the money which they could have obtained from the sale of these bonds, had sustained damage generally. But the plaintiffs in this connection did not offer to show any special instance of damage except the damage which they claimed to have suffered in the case of their debt to the Bank of Ogdensburgh. This evidence was also objected to by the defendants and excluded by the court.

The plaintiffs then claimed that upon their evidence admitted by the court, they were entitled to more than nominal damages. But the court decided that there was no evidence in the case upon which the plaintiffs would be entitled to recover any exemplary damages, and instructed the jury that the plaintiffs were only entitled to recover nominal damages. The jury thereupon signed a verdict for the plaintiffs for nominal damages. To the decisions of the court in excluding the evidence offered by the plaintiffs, and directing the jury to return a verdict for nominal damages only, the plaintiffs excepted.

Linsley & Prout and E. J. Phelps, for the plaintiffs.

Geo. F. Edmunds and Briggs & Nicholson, for the defendants.

BARRETT, J. I. As to the power of the court to permit, by order, the return of property in mitigation of damages, &c.

That such a power is assumed and exercised by the English courts of common law was very properly admitted by the learned counsel for the plaintiff, in view of the reported cases in

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which the subject is involved. The subject came under the consideration of this court in *Hart v. Skinner*, 16 Vt. 138, and the fact of such a power and of its exercise was clearly evolved and asserted as matter of settled law in Westminster Hall.

In the case of *Yale v. Saunders, et al*, *Ib.* 243, WILLIAMS, Ch. J., says: "Indeed courts may, on motion of the defendant, order a return of goods in some cases against the wishes of the plaintiff, and such return will reduce the damages to those actually sustained in consequence of the wrongful taking. This was decided at the last term of this court in Chittenden County," referring to *Hart v. Skinner*. This must be regarded as a recognition of the power as incident to, and residing in, a common law court as well in this country as in England.

In 2 Hill, 132, COWEN, J., says: "It is quite common for the court to make a rule stopping the action on a re-delivery, and payment of costs." This power would seem to be of the same character as that which is so commonly exercised, of permitting, by order, money to be paid into court after the day of tender has passed. In actions of trover its exercise is but a mode of attaining an end, as between the parties, analogous to the permitting to be shown in mitigation of damages, that the property converted has come back to the possession and use of the plaintiff, or has been applied by some third person, or by operation of law to the plaintiff's benefit. See 6 Mass. 20. 24 Wend. 379. The purpose is to invest the plaintiff with all the legitimate fruits of his action, by making him whole in respect of the property for the conversion of which he has brought his suit, with just costs.

We feel fully warranted, now that the point is directly presented, in holding that the county court has the power, as incident to its character as a court of common law jurisdiction and authority to permit, by order, the return of the property sued for in mitigation of damages, and, on payment of costs, to order that the plaintiff thereafter shall proceed at his peril as to subsequent costs.

II. It is next to be considered whether the present is a proper case for the exercise of that power.

As matter of course its exercise would not be proper, when it would result in depriving the plaintiff of full reimbursement for

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the damage caused by the conversion, as depending on the value of the property, nor when the conduct of the defendant in the taking and use of the property should be such as to disentitle him to be favorably regarded by the court.

Though it is said in *Rogers v. Crombie*, 4 Greenl. 236, by MILLER, Ch. J., that the motion for such an order "must be considered as addressed merely to the discretion of the Judge, and, of course, one upon which his decision is final;" still it is undoubtedly true that there are well established rules by which it is to be determined whether the particular case is a proper subject for the exercise of that power by the court. If the case should fall within the rules, then, undoubtedly, the exercise of discretion by the Judge, in determining whether or not to grant the order when applied for, would be final, and not subject to revision on exceptions.

LORD MANSFIELD, in *Fisher v. Prince*, 3 Bur. 1363, indicates the ground and the outline of the rules that have become established on this subject. They are substantially embodied in *Hart v. Skinner*, cited *supra*, and are well stated in a learned note by the Reporter to the case of *Yale v. Saunders*, cited *supra*, in which note the English cases are referred to and collated.

With a slight modification the rules on this subject were well and comprehensively stated in the argument by the learned counsel for the plaintiff. And it is to be remarked that the defendant's counsel proceeded in the discussion of the case upon a recognition of these rules, claiming that the present case falls within them.

In many cases the courts have declined to exercise their power in this respect,—not because the power was lacking, but because the case was either excluded by the rules of law, or it did not commend itself to favorable regard. The case of *Tucker v. Wright*, 13 E. C. L. 64, is in point for illustration. In it the power of the court was recognized, but its exercise was denied. It was a motion for obtaining a *stay of proceedings* on bringing certain cloth into court and paying the costs. The whole matter of damage was open, and involved the question of the identity as well as of the deterioration of the cloth, and of the injury resulting from its detention. In the language of Sergeant Wilde in

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opposing the motion for the rule, "there was a complicated dispute between the parties, and the value of the cloth was not ascertained." Of course, an order for a stay of proceedings would have been a summary way of ending a complicated dispute; as to which, I think, Ch. J. BEST was well warranted in saying, "such a motion was never made before."

A distinction is to be taken between cases in which the motion is for an absolute stay of proceedings upon the redelivery of the property and payment of costs, and those in which the motion is that upon the redelivery of the property and payment of costs, the plaintiff shall thereafter proceed at his peril.

When the property is of a fixed value, and from its nature cannot be the subject of deterioration, then, though the plaintiff may claim damages beyond the value of the property, either in the character of general or special, the order may be made as was done in this case.

In *Gibson v. Humphrey*, 1 Cr. & Me. 544, the motion was for an absolute stay of proceedings. It was properly denied, for the reason that there was contention as to the value of the property, as well as to the necessary consequential damages. This would constitute a good reason why such an order as that in the present case should not be made.

The remarks of the learned Barons were directed to the very motion before them; and, of course, the order would not be granted where its effect would be to cut off the plaintiff from prosecuting his legitimate claim for damage, whether it was to be measured by an estimated value of the property, or accruing by reason of the unlawful detention of it. This distinction is clearly marked in a note, by the editor, to that case, as follows: "The delivery of the property in question in an action of trover is no bar to the right to recover costs and special damage, (citing *Rank v. Rank*, 5 Barr 211.) But where no special damages are claimed, the court may *stay proceedings* on the restoration of the property uninjured, and payment of costs," (citing *Tracy v. Good*, 3 Penn.)

This distinction reconciles the seeming incongruity in the cases, and in the language of the judges in passing upon the questions before them.

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The case of *Fisher v. Pyne*, 39 E. C. L. 437, was a different proceeding, but bearing some analogy, perhaps, to a stay of proceedings on the bringing in of the property and paying the costs in an action of Trover. So far as it bears such analogy, it seems to have proceeded on the same reason; and the order was denied on two grounds, one of which was that the subject of damage was open and unliquidated.

In the present case it appears that the bonds sued for came lawfully into the possession of the defendants, and were held under a claim of right, in respect to which we do not discover any lack of good faith. So far, then, the case is not outside of the rules of law. It is to be inquired then, whether the value of the property has depreciated. However this might have been in respect to a third person as owner and holder of the bonds, it is difficult for us to see how it can be so as to the plaintiffs.

Whatever they are intrinsically worth, depends, primarily, on the liability of the plaintiffs to pay them. They are designed to constitute a negotiable indebtedness of the railroad company, the value of which to the company, prior to being negotiated, does not consist in the fact of an existing indebtedness which it can convert into money, but in the fact of their being a means of obtaining a temporary use of money upon the stipulations and securities contained in the bonds themselves.

In the hands of a third person, lawfully holding them, they are of value by reason of the liability of the company to pay them according to their terms. When that liability ceases, the bonds cease to be of value or the representative of value. Before negotiation they have no value, because no liability on the part of the company to pay has become attached to them. After having been negotiated, when again they shall have come lawfully into the hands of the company, they will stand the same in respect to value as they were originally before negotiation. Whatever, therefore, they are intrinsically worth, either in respect to the material of them, as printed and written paper, or as instruments of contract, remains the same to the company whenever they are lawfully in its hands without payment. Indeed, it is very difficult to apprehend and appreciate the idea of deterioration in value to the company of its own liability to pay. In respect to

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third persons, in favor of whom such liability has accrued, it is quite easy to understand.

So far, then, as the damages are to be measured by the value of the property, the restoration of the bonds to the plaintiff would reimburse them. If the plaintiff has been further damaged, it is by reason of the detention of the bonds by the defendant; and that, not by reason of the use to which the bonds have been put by the defendant, either working an injury to the property itself, or yielding a benefit to the defendant for which the plaintiff is entitled to be compensated; but it is purely in the nature of *special damage*, accruing by reason of the plaintiff having been prevented from using the bonds for legitimate and beneficial purposes.

In respect to such damages the rule is well understood, requiring them to be specially averred, in order to entitle them to be recovered in any form of action. For present purposes it is not necessary to decide whether *special damages* may or may not be recovered in this form of an action. It is enough to say that they cannot unless specially averred. Now, within any precedent or rule promulgated in the books, it seems quite clear that special damage is not so averred in this case as to entitle the plaintiff to give evidence of it on the trial. Upon the views thus taken, we are satisfied that this case, as it was before the county court, presented warrantable grounds for the exercise of the power of the court to order, that upon the production of the property and the payment of the costs by the defendants, the suit should thereafter proceed at the peril of the plaintiff as to costs. We have no occasion to criticise the details of the order, inasmuch as it results in giving the plaintiff the right to proceed without prejudice for the recovery of any damage, general or special, which it might show itself entitled to, with full costs, in case it should succeed in showing any that was not reimbursed by the delivering up of the bonds.

The consideration which we have thus given to the case, under the first bill of exceptions, sufficiently indicates that we think the county court committed no error in giving effect to said order on the trial, and permitting the bonds to be delivered into court to respond to the damages, so far as depended on the value of the bonds themselves.

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But it is claimed that the plaintiff was entitled to recover other and further damage than the mere value of the bonds, and that the court erred in excluding the evidence that was offered and in directing the jury to return a verdict for nominal damages only.

Any damage that was the natural and necessary result of the conversion, the plaintiff would be entitled to recover under the general averment of damage. The case of *Hickock v. Buck*, 22 Vt. 149, is the type of a large class of cases, and illustrates the application of this rule in a case where the plaintiff was allowed to recover, not the value of the property, but a just compensation for the loss of the use of it, for a period during which he was entitled to the possession and use of it.

He was entitled by contract to the possession and use of the defendant's horse for a fixed period in the carrying on of a rented farm. He had taken the possession and was in the use of the horse under the contract. Before the term expired the defendant wrongfully took away and kept the horse. There the use gave value to the right of possession, and the loss of that use was the ground of necessary damage to the plaintiff. But in turning from that case to the present, can it be said that it has been both the natural and necessary result of the withholding of these bonds that the plaintiff has sustained actual pecuniary loss? If so, it is not obvious to us. If they had been lying in the plaintiffs' safe during the same period, they would have been fruitless of profit. If they had been afloat in market they would also have been fruitless of profit, for they would have borne with them the liability on the plaintiff not only ultimately to pay the principal, but currently to pay the interest at seven per cent. In order for them to have been a source of necessary profit, it should appear that the plaintiff would have commanded a premium upon them in excess of the current rate of accruing interest.

The most that can be claimed in behalf of the plaintiff for these bonds, is that they should be regarded as standing to the company instead of money, say bank bills; as a kind of special currency authorized by the legislature and the usages of business. Suppose the defendant had received and held a package of ten thousand dollars in current bank bills belonging to the plaintiffs, for which suit should be brought. They would measure their

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own value, and by their restoration the plaintiff would be reimbursed that value. The remaining general damage would be the interest on the money during its wrongful detention. But in the case of these bonds, the plaintiff's liability to pay the interest just counterbalances the right that would accrue in respect to interest in the supposed case of the money.

We think it would not be claimed that the plaintiff would be entitled to recover, as *general* damage, for the loss he had sustained in not being able, for want of his money, to pay his pressing debts, or to avail himself of opportunities for profitable investment or speculation. Nor do we think it would be claimed that, as *special* damage, under any form or minuteness of special averment, such loss could be recovered, and for the obvious and cogent reason that it would be too contingent, remote and uncertain to be the subject of reliable estimate.

If in the supposed case of the detention of the money, the same conjuncture of affairs had occurred as was offered to be proved in respect to the debt to the Ogdensburgh Bank, we think the proof would not have been properly admissible under any averment in the present declaration, and as at present advised, we think it would not be under any declaration that could be made. But what seems to be specially noticeable in the present case, as distinguishing it from the one supposed, is, that in that case the appropriation of the money to that debt would have operated as a payment of it, while the use of the bonds for that purpose would only have shifted the form without diminishing the obligation or the amount of the plaintiff's indebtedness. This characteristic incident is not important perhaps, in the view in which the claim for damages was made on the score of the debt to the Ogdensburgh Bank. We think the evidence not admissible, irrespective of this feature of the case.

The proof offered as to counsel fees and expenses incurred in this suit, was properly excluded, because in no view could these expenses be regarded as in the nature of damages either general or special. They could be brought into consideration, if at all, only as operating upon the judge in exercising his discretion, upon the motion for the order as to the re-delivery of the bonds and payment of costs.

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The offer of evidence as to the embarrassment caused to the plaintiff in prosecuting its business by reason of being deprived of pecuniary means of which it could have availed itself, if it could have had the use of the bonds, was also properly rejected, for the same reason, *a multo fortiori*, as that which justified the exclusion of the evidence of embarrassment produced in reference to the debt to the Ogdensburgh Bank.

We do not deem it necessary to cite or comment on the authorities of text books and cases bearing on this subject. They are uniform and consistent in the same direction as to what constitutes *general* as distinguished from *special* damages, what may be given in evidence under the general averment of damage, what can only be given in evidence under an averment of special damage, and what cannot be given in evidence and recovered for under either general or special averments.

We agree with the counsel for the plaintiff that in this action, notwithstanding full effect be given to the special order as to the return of the bonds, the plaintiff would be entitled to recover for any general damage shown to have been sustained beyond the value of the bonds themselves, as well as for any special damage that should have been properly averred and proved. Upon a very careful examination of the case, however, we are not able to discover that the course taken by the county court has deprived the plaintiff of any right to which it was entitled in respect either to general or special damage.

The judgment is affirmed.

HIRAM W. LINCOLN v. JOHN BUCKMASTER.

Lunatic. Negligence. Good faith.

If one contract with a lunatic, and under such contract furnish him money and render him services, which, however, prove of no benefit to him, he cannot recover of the lunatic therefor, even though he in good faith supposed him to be sane, provided the circumstances known to him in regard to the other's mental condition were such as to convince a reasonable and prudent man

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of his insanity, or even to put him on an inquiry by which he might, if reasonably prudent, have learned that fact.

One may act in good faith and still be guilty of gross negligence.

The liability of lunatics upon their contracts with parties ignorant of their lunacy discussed by REDFIELD, Ch. J.

BOOK ACCOUNT. The account presented by the plaintiff was for money lent the defendant and for the plaintiff's services and expenses while in the employment of the defendant.

The auditor reported the following facts:

The defendant admitted that the plaintiff had lent and paid out the money and performed the services as charged in his account, but objected to the allowance of the same on the ground that at the times of lending the money and performing the services the defendant, from mental alienation, was incapable of making a binding contract, and wholly unfit for the transaction of business, and that this was known by the plaintiff.

It appeared from the evidence introduced on the trial, that for many years prior to May, 1854, the defendant had been an active and successful business man of sound judgment as to the value of property; that he had been engaged in the mercantile business, but had not been in the habit of buying horses for market and had not dealt much in that kind of property; that about the first of May, 1854, the defendant commenced buying horses for the purpose of sending them to market; that he had no use for them in his own business except to sell at a profit; that he became very much excited on the subject of trade and speculation, and more particularly in relation to horses; that he soon had bought eighteen horses mostly unfit for market, and at extravagant prices; that he valued them much above the prices paid and was expecting to realize a large profit in these transactions; that the defendant was at home but a small part of the time; that he was up a good deal during the night and took but little sleep; that about the 13th of May, 1854, the defendant's family became alarmed at his course of conduct, and sent for one Ketcham, his son in law, who came and devoted the most of that month and the early part of June in taking care of the defendant's property and in endeavoring to prevent his trading, and also in returning the

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horses that the defendant had bought, and in disposing of them as he found opportunity ; that before any of the charges were made by the plaintiff, the defendant, through the advice and persuasion of friends, had in the latter part of May, 1854, assigned his personal property, including the horses he had bought, to Ketcham, and had promised to give up trading and speculating ; that the plaintiff and defendant both resided in the same town, and it was generally known there that the defendant's family and friends at that time thought the defendant was not in the exercise of his ordinary faculties, and regarded him as unfit for business, and were endeavoring to keep him from trading, and that the plaintiff was informed as to these circumstances, but thought the defendant as capable of managing his own business as he ever had been. On the 3d of June, 1854, the defendant agreed with one Huntoon to purchase of him a span of horses at four hundred and fifty dollars, but the trade was not fully consummated on that day, either by delivery of the horses or the payment of anything to bind the bargain. A day or two after this, Huntoon and the plaintiff (who was Huntoon's son-in-law,) came to the defendant's house and there (in the presence of the plaintiff) had further negotiations with the defendant about the sale of said horses. A trade was, on this occasion, finally consummated, by which it was agreed that the defendant was to have the horses at the depot in Shrewsbury the then next Tuesday morning, and there place them in the care of the plaintiff, who was to take them to Boston by railroad and assist the defendant in selling and disposing of them in market, the defendant at the same time agreeing to pay the plaintiff for his services and his expenses. The plaintiff was to keep the horses in his own possession and not to deliver them to the defendant till the defendant paid for them. The defendant intended to go to Boston and was expecting to receive money as soon as he arrived there to pay over for the horses. Before this trade was finished at the defendant's house, which was on about the 6th of June, 1854, and while Huntoon and the defendant were negotiating about the same, Ketcham told Huntoon, in the presence of the plaintiff, that the defendant was not fit to do business ; that his personal property was in his, Ketcham's, hands, and that if any trade was to be

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made it must be made with him. The plaintiff thereupon asked Ketcham what authority he had over the defendant, and said to him that they had always considered the defendant capable of doing his own business, and it appeared that the plaintiff did believe the defendant fit to transact his own business at that time. The trade for the horses was, however, afterward on the same day completed, and the defendant borrowed of the plaintiff ten dollars to pay to Huntoon to bind the bargain, and paid it over to Huntoon in the plaintiff's presence, but it did not appear that the plaintiff knew for what purpose the defendant wanted this money. This ten dollars constituted the first item in the plaintiff's account. The horses were at the depot on Tuesday morning as agreed, and were placed by Huntoon and the defendant in the care and keeping of the plaintiff, and the defendant at this time borrowed of the plaintiff ten dollars more for his expenses to Boston, which was the second item in the plaintiff's account. The plaintiff took the horses by cars to Boston on that day, paid the expenses and spent the time as charged in his account in taking care of and in selling and disposing of them, which charges were reasonable in amount. The defendant went to Boston the same day, expecting to get money there to pay for the horses, but did not obtain it, and soon returned to Vermont. While the defendant was in Boston he gave the plaintiff directions to sell the horses for six hundred dollars, and at another time he gave different orders. The day before he left Boston he directed the plaintiff not to sell them for less than one thousand dollars; but the plaintiff did sell them for four hundred and fifty dollars, but on taking them out to deliver them to the purchaser, one of them proved to be slightly lame, and fifty dollars were retained on that account by the purchaser, so that the plaintiff in fact received only four hundred dollars for them. The plaintiff had been in the habit of taking horses to the Boston market more or less for years previous, and was well acquainted with the market value of these horses, and was a suitable person to take charge of such business, and acted in good faith in selling and disposing of them as he did, and sold them for their full value. The plaintiff took the whole care and charge of the horses in Boston, as by the terms of the contract between Huntoon and the defendant he had

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agreed to do, and exercised a good discretion and used due diligence in selling and disposing of them, but on one or two occasions he refused to comply with the defendant's request, to take them out to show to persons proposing to purchase, on the ground that the times and places were not proper. The defendant was not then in a proper condition to do business, and the plaintiff in refusing the defendant's request at those times, acted in good faith, and for the interest of the defendant. The plaintiff returned to Vermont soon after the sale of the horses, and on the 17th of June, 1854, the defendant called on Huntoon and gave him a written order on the plaintiff for the four hundred dollars, and at the same time gave his note for forty dollars which was the balance due for the horses to Huntoon, and the plaintiff paid over to Huntoon the four hundred dollars on such order. On the same occasion the defendant told the plaintiff he would settle and pay him at another time. The plaintiff had agreed with Huntoon to take this span of horses to Boston for him and sell them for him if Huntoon should not succeed in disposing of them himself.

The auditor further reported that from the evidence he found that from the early part of May to the first of July, 1854, and at the time of the sale of the horses above mentioned by Huntoon to the defendant, and at the time the plaintiff's account accrued, the defendant was, by reason of partial insanity and the loss of his usual and ordinary judgment as to the value of property, and particularly in relation to trade and speculation in horses, wholly unfit to do business, and was incapable of making a binding contract in such kind of property, and that the plaintiff was so informed by Ketcham before the accruing of any part of the plaintiff's account; that the defendant was in fact in the same state of mind on the 17th of June, 1854, when he gave Huntoon the written order and his own note, as before stated, and promised the plaintiff to settle and pay his account at some other time; that the plaintiff acted in good faith in lending the defendant the money charged in the first two items of his account, and in paying out and expending the money, and in performing the services as charged in his account, honestly supposing and believing that the defendant was as capable as ever of transacting his own busi-

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ness and making contracts, but that in fact, the money lent and advanced, and the services performed by the plaintiff as charged, were of no use or benefit to the defendant in the situation he then was.

Upon this report, the county court, at the March Term, 1858, —PIERPOINT, J., presiding,—rendered judgment for the defendant, to which the plaintiff excepted.

W. H. Smith and David E. Nicholson, for the plaintiff.

Linsley & Prout, for the defendant.

REDFIELD, Ch. J. The facts found by the auditor in this case, in his final summing up, are, that at the time of the sale of the horses by Huntoon to the defendant, he was, by reason of partial insanity and the loss of his usual and ordinary judgment as to the value of property, and particularly as to trade and speculation in horses, wholly unfit to do business and was incapable of making a binding contract in such kind of property, and that the plaintiff was so informed by the defendant's family before the accruing of any part of his account, and that the defendant continued in the same state until the close of the whole transaction, by giving Huntoon an order for the money and his note for the balance of the agreed price of the horses. Then follows the plaintiff's side of the case, which seems not very consistent with all that goes before; that the plaintiff acted in good faith in lending the money and performing the services charged, supposing at the time that the defendant was competent to contract, but that in fact neither the money nor the services charged were of any use or benefit to the defendant in the state he then was.

We must then assume in this case, for the auditor so finds, that the plaintiff really did, in some way, believe that the defendant was of sound disposing mind, and altogether capable of making binding contracts, and, possibly, that in lending him the money, and performing the service he was rendering him a useful and valuable service, however strange it may seem in connection with the other facts reported by the auditor. But this is not sufficient to enable him to recover compensation of a lunatic. If he had received no notice whatever of the defendant's infirmity, and even had no suspi-

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cion of it, it will not render his contracts binding, as such. When one is in the state of mental unsoundness found in this case, he is wholly incapable of making a binding contract, as much so as an infant, or a married woman. Any other view of the case would be absurd almost. It certainly shocks all our notions, either of justice or reason, and equally of law.

But notwithstanding this incapacity to make contracts, the law recognizes many legal obligations, which for his own benefit, or that of others connected with and dependant upon him, or from considerations of policy, the lunatic may assume, and which will form the basis of an action, in the courts of law and equity. But we shall find that this is allowed chiefly for the protection and support of the lunatic, or his family, or to prevent serious injustice to those who have dealt with him, having no means of knowing or learning his incapacity. But this is never done to the wrong and injury of the lunatic. His mental infirmity is a full protection against all injustice, but it cannot be made the occasion of inflicting injustice upon others, who are without fault, unless that result is necessary to protect the rights of the insane person. POLLOCK, Ch. B. in *Gire v. Gibson*, 13 M. & W. 625.

S / I. There is a class of cases where merchants have purchased goods, in the ordinary course of their business, and on credit, while they were in fact insane, but without any suspicion of the fact, on the part of the seller, and where the goods cannot be restored to the seller. In these cases the lunatic has been held liable for the value of the goods. *Beals v. Lee*, 10 Barr. 56; *Molton v. Comroux*, 2 Exch. 502, S. C. 4 *id.* 17. But this I apprehend is not on the ground of the contract, but because the lunatic has enjoyed the benefit of the goods, and cannot now restore them. He is made liable for the goods which he has put to his own use as for a tort, the same as if he took them without leave.

So, too, where the plaintiff has supplied the defendant, being a lunatic, with necessaries suitable to his circumstances, if done in good faith, believing the party needed them, he may recover. Some of the cases hold this, if the plaintiff was wholly ignorant of the infirmity. *Baxter v. Earl of Portsmouth*, 5 Barn. & Cr. 170. But upon principle, in such a case, it would seem one might always supply a lunatic, or his family, with necessaries

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for his support and care and for the maintenance of his family, even although aware of his infirmity. But it should be done, of course, with the concurrence of the near friends of the lunatic, whose duty and right it is to direct in regard to such matters. This right to supply necessities to lunatics will not justify any one in crediting them with what might otherwise be necessities, so long as they are rightfully under the care and control of family friends, on the ground that they are not properly supported, any more than one can so interfere in the mode of clothing and educating infants, while under the care of their natural or legal guardians. All the cases hold this.

And some of the American cases go the length of holding that no recovery can be had against a lunatic, upon a contract, express or implied, unless for necessities. *Seaver v. Phelps*, 10 Pick. 304; *Fitzgerald v. Reed*, 9 Sm. & Marshall; *Pearl v. McDowell*, 3 J. J. Marshall, 658.

It seems to be the practice of courts of equity not to interfere to set aside the contracts of lunatics which have been executed, and where it is impracticable to restore the parties to their condition before the contract, unless the party contracting with the lunatic obtained an unjust advantage in the contract, or knew of the infirmity; *Niel v. Morley*, 9 Vesey 478. The reason assigned here for not interfering is the impracticability of doing full justice under the circumstances. The parties are left to their legal rights; *Segeon v. Leaky*, 2 Atk. 412. This was an application to set aside a disposition of property made by the lunatic with the approbation of his only son, and which seemed to be beneficial to the lunatic, and the court declined to interfere.

It is evident from a careful examination of the decided cases that the law is not fully settled as to the extent of the liability of lunatics arising out of contracts.

The equity cases referred to above, and others which have followed them, hold very distinctly that courts of equity will not interfere to set aside the contracts of lunatics, made with those who had no reason to believe them such at the time the contracts were entered into, and when they have been fully executed, upon both sides, and the parties cannot now be restored to the condition in which they were in before the contract. And the same

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rule obtains at law, when the action is brought to recover back what the lunatic has done under the contract, and thus to rescind a contract executed on both sides. The case of *Molton v. Comroux*, 2 Exch. 486, where the lunatic sought to recover back premiums which he had paid upon the insurance of his life, is of this character. The contract had been fully executed on both sides in good faith, and without any ground of suspicion on the part of the insurers, that they were selling the annuities to one not fully competent to contract.

The opinion of the learned Chief Baron is full and explicit upon this point. "We may safely conclude," said the learned Judge, "that when a person apparently of sound mind and not known to be otherwise, enters into a contract for the purchase of property, which is fair and *bona fide*, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterwards be set aside." But the court here expressly decline to lay down any general proposition short of this. They decline to say that all executed contracts are binding upon lunatics if the other party is not in fault. This case is affirmed in the Exchequer Chamber, but upon the same narrow ground, that the contract was fully executed upon both sides, and that the action was brought to recover back what the lunatic had paid, without restoring what he had enjoyed under the contract, as the consideration for which he paid the money. This is precisely the principle upon which the equity cases above cited were decided. And it seems to me this is the only sound ground upon which it can fairly be said that courts of law or equity can treat the contracts of lunatics as binding, in any sense, and that only because it would be manifest injustice to allow the lunatic to enjoy the benefit of what he had received, and also recover back what he had paid. This is never allowed in the case of infants even. That point has been more than once decided by this court, in regard to infants; *Farr v. Sumner*, 12 Vt. 28; *Taft v. Pike*, 14 Vt. 405; *Weed v. Beebe*, 21 Vt. 495. Other cases still might be cited from our reports where the same principle is recognized.

And it seems to me that this is the only sound principle to

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apply to the subject, considered merely in the light of a contract. I am confirmed in this view by the opinion of Mr. Justice WILDE, in *Seaver v. Phelps*, 11 Pick. 304, 306, who quotes with approbation the case of *Thompson v. Leach*, 3 Mod 310, and adopts the language of that decision, "that the grants of infants and of persons *non compos mentis*, are parallel both in law and reason." And all who are familiar with the character of this very able judge will readily comprehend that this view was not expressed without the utmost study and deliberation. We have had few American judges so deeply versed in the principles of the common law as this eminent jurist, and fewer still perhaps who have left on the reports so many opinions, so carefully studied or correctly written.

The opinion of Prof. GREENLEAF, 2 Evidence, sec. 369, is certainly entitled to great consideration, for he is confessedly the most reliable of all the American text writers, so much so that Mr. TAYLOR, in England, in preparing a new treatise upon the law of evidence, thought it necessary to copy literally almost the entire work, with no credit except in the preface, which is practically none at all. This is a compliment which no other American law writer has ever received. And this writer says, "it seems now to be generally agreed that the executed contract of such person is to be regarded very much like that of an infant, and that therefore when goods have been supplied to him which were necessities or were suitable to his station and employment, and which were furnished under circumstances evincing that no advantage of his mental infirmity was attempted to be taken, and which have been actually enjoyed by him, he is liable in law, as well as equity, for the value of the goods.

But we are aware that some few cases have gone beyond this and held the lunatic liable for any goods which he had been so furnished with, by a party supposing him to be sane, and which he had used or disposed of, so that they could not be restored, without reference to the fitness of the goods for one in his condition. The case cited from the 10 Barr 56, is of this character. These cases, as before intimated, can only be vindicated, as it seems to me, upon the ground that a lunatic is liable for his torts, provided there is no fault on the part of the owner of the property injured by

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him, in leaving it improperly exposed. This liability of the lunatic has been recognized in this State.

It goes probably upon the ground that the friends of the lunatic should see that he is properly restrained. And if the lunatic is held responsible for his torts, in taking and converting goods, without permission, there is no great hardship in subjecting him to the same degree of liability for goods converted to his use under color of a contract which he subsequently avoids, thus leaving the case much the same as if he had taken the goods without permission. But this kind of liability only attaches where the owner of the goods is altogether without fault. If the lunatic obtains possession of the goods through the neglect, and especially the gross neglect, of the owner, he cannot recover damages of the lunatic which resulted in any degree from his own carelessness. He might possibly recover in such a case to the extent of the actual benefit received by the lunatic, but not for a loss which occurred through his own carelessness, and which did not benefit the lunatic.

To apply these principles to the facts in the present case, it must be very obvious to all that the plaintiff can claim nothing on the ground of having furnished actual necessities to the defendant, or indeed what was suitable and proper for him to have under the circumstances. The facts found by the auditor show that instead of being or proving useful or beneficial, they were no doubt positively detrimental. And it would seem that any man possessed of ordinary sagacity, after the admonition he received, might have understood the matter in that light. But the auditor says the plaintiff did not so regard it. He acted in good faith, but with great negligence and want of care.

The only remaining inquiry is whether the defendant obtained possession of the plaintiff's money and services, without any such want of care and diligence on his part, as a prudent and careful man would not have been guilty of in the management of his own business of equal importance? It seems to us there can be but one opinion in regard to this point. And this in no sense conflicts with the finding of the auditor that he acted in good faith. This one may do, and still be guilty of the grossest, the most flagrant negligence and want of care. This

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has long since been settled in the English and American courts. For although gross negligence may be evidence tending to show bad faith, it is by no means the same thing. They often exist together in the same person in the same transaction.

Here there is a total loss for some one to bear. The defendant was wholly incapable of forming a correct judgment upon the subject. Of course he cannot be held responsible for his conduct on the ground of mere assent. No blame attaches to him, except for putting the plaintiff's property to his own use. His consent is no excuse for the plaintiff's want of care and prudence in the matter. Did the loss then occur from such want of care in the plaintiff? It seems so to us beyond all question.

Let us suppose the plaintiff to be wholly disinterested, and as to a lunatic he is bound to act in that light, after being informed of the fact, although he do not credit the information, and he is then affected with notice of all the other facts in regard to the defendant's insanity, which he might have learned upon reasonable inquiry.

Let us then suppose the plaintiff wholly disinterested and informed that the defendant's family and friends regard him as insane, and especially upon the subject of trading in horses, and that he is in fact buying the most forlorn and desperate class of horses all over the county, with a view to the market, and that in great numbers; and let us also suppose that the plaintiff is a man of reasonable sagacity and fairness, and that under all these circumstances he is applied to for the purpose of carrying into effect another horse trade, and he finds the owner of the horses unwilling to trust them to the defendant. He must be responsible for them until paid for or sold, and the price realized. Could we expect him to push the defendant into and through such a transaction as followed, unless he was looking to some other end or interest than the defendant's? Certainly not. The plaintiff cannot expect any one to pronounce his conduct prudent and careful and disinterested, as detailed by the auditor. It is impossible to arrive at any such conclusion by fair argument and induction. It may be he acted in good faith, but if he did he is certainly very careless and onesided. And if he has after full notice, through his own foolhardy rashness and folly, led a lunatic

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into a transaction of this kind, from which no benefit has resulted to any one, unless it be Huntoon, he must be content to sustain the loss which resulted from his own folly, so far as he is himself concerned. It is impossible that any court should visit such a loss upon the lunatic.

It is not important to comment upon the other facts found by the auditor in the case. It would seem rather difficult to make all the other facts found stand consistent with the finding of good faith in the plaintiff. It is very obvious to me that the plaintiff did not treat the defendant as his employer and he a mere servant, and at the same time, as being capable of managing his own affairs.

1. He refused to exhibit the horses to customers when the defendant requested it, because he, the servant, thought it not proper.

2. When expressly instructed not to sell the horses for less than one thousand dollars, he sold them almost at the very same time for four hundred dollars, and without any change in the market, and only a change of fifty dollars, at most, in the horses, and when, by the sale, the defendant must lose some two hundred dollars !

3. He seems all along to have acted, in fact, as the agent, and in the interest of Huntoon, and on that side he seems to have been watchful, careful, and successful !

The horses are going to market and he going with them for Huntoon, and at the same time they did go too, as it seems, and Huntoon will not let them go unless the plaintiff goes with them and is responsible for the custody of them. He is then virtually Huntoon's agent, forced upon the defendant, after he is told of his insanity.

And what is the effect of the contract which he thus secures of this reputed lunatic, for the benefit of his former employer, and father-in-law ? It only amounts to a guaranty that the horses shall bring enough above four hundred and fifty dollars to pay all expenses of carrying to market, on condition that he shall have what they bring more ! This was the legal effect and almost the form of the contract. For they would not deliver the horses until paid for or sold, and then Huntoon should have four hundred and fifty dollars, the plaintiff all he had paid, and pay

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for his services, and the remainder should go to the defendant. And this is the protection which the law accords to lunatics, or reputed lunatics, which those who thus deal with them choose to consider sane. We think if one will make such a contract with a reputed lunatic, he must incur the risk of his own rashness and carelessness, in not making proper enquiry and examination into the affair, when it turns out that the party was really *non compos*.

Judgment affirmed.

NORMAN Y. BRINTNALL v. THE SARATOGA AND WHITEHALL
RAILROAD COMPANY.

Pleading. Variance. Supreme Court. Practice. Railroads.
Deposition. Common Carrier.

When the declaration contains several counts, setting out the cause of action in different ways, to meet any differences that may arise on the proofs or different views that may be taken of the legal effect of the language of a contract, it is the duty of the county court, when any question is there made upon the matter, to direct the attention of the jury and confine the recovery to such counts as the proof sustains; but when no question is raised thereon, and the court is not called upon to distinguish between the different counts and the special applicability of the evidence to each, and no objection is made to the admissibility of evidence upon particular counts, no exception can be taken, because the court does not voluntarily assume such duty.

It is a general rule that the supreme court will not revise any questions except such as appear to have been raised in the court below; and this rule applies with peculiar propriety to questions of variance, (unless the variance appears of record, and is of such a character that the judgment would not protect the parties in reference to the matter actually litigated,) as such questions, if raised in the court below, can generally be removed, either by further proof or by amendment.

A box of goods, marked and directed to B., at Boston, was delivered by B.'s agent, at Saratoga Springs, to a railroad company, to be transported over their road on its way to Boston. The defendants gave a receipt therefor in these words: "Received, Saratoga Springs, September 17, 1855, from B., in apparent good order, one Box, to forward to Castleton, for B., Boston, Mass., at freight of — per 100 lbs. weight." It appeared that Castleton

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was the terminus of their road toward Boston, and that with the Rutland and Washington Railroad, with which it connected at Castleton, and other roads, a line of railroad communication was formed between Saratoga Springs and Boston; *Held*, that the defendants were only liable for the safe delivery of the box of goods at the end of their own road in Castleton, and that it was their duty there to deliver it over to the railroad forming the next chain in the line to Boston; and that it was sufficient to establish, *prima facie*, a right of recovery on the part of B., in an action on the case against the defendants, for negligence as common carriers, for the loss of the box of goods, to show its delivery to them, and that it had not arrived at Boston, and was lost.

B. was duly notified to be present at the taking of depositions on behalf of an adverse party, and was present, by his attorney, at the appointed time and place, when the deposition of M. was taken, pursuant to the notice, the adverse party appearing only by P., by whom the examination was conducted in its behalf, and who was not its attorney of record in the cause in which the deposition was to be used. Immediately at the close of taking it, a duplicate of the deposition was taken by the same magistrate, to be used in the same case, at the request of B., P. being verbally notified by the magistrate and present, but declining to appear or act in behalf of the adverse party upon the taking of the duplicate deposition, or to consent that B. might have the benefit of the original; *Held*, that the notice of the taking of the duplicate deposition was not sufficient under the statute, (No. 4, of 1854,) and it was therefore inadmissible.

CASE against the defendants for negligence as common carriers. The first count of the declaration was substantially as follows: that on the 17th day of September, 1855, the defendants were, and ever since have been, common carriers of goods for hire, from Saratoga Springs, New York, to Castleton, Vermont; that the plaintiff, on that day, at Saratoga Springs, caused to be delivered to the defendants, who then and there accepted it, a box of goods, containing five hundred yards of lace, one hundred boxes of hosiery, five hundred peices of white goods, and other merchandise, of the value of fifteen hundred dollars, belonging to the plaintiff, to be carried from Saratoga Springs to Castleton, for a certain reasonable reward to be paid by the plaintiff to the defendants; and that the defendants did not so carry it from Saratoga Springs to Castleton, nor at Castleton deliver it for the plaintiff, but that by their negligence and carelessness, the box, with its contents, was lost. The other counts were substantially the same, with these exceptions; the third count alleged that the box of goods was to be carried by the defendants

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from Saratoga Springs to Boston, Mass., and that they were common carriers between those points; the fourth count was the same, after substituting "Charlestown, near Boston," in place of "Boston;" and the fifth count set forth that the defendants were common carriers between Saratoga Springs and Castleton, and had business connections with other common carriers between Castleton and Charlestown and Boston; that the box of goods was directed to the plaintiff at Boston, and was delivered to the defendants to be sent by them to Boston, and to the plaintiff at Boston, and that the defendants received the same to forward to Castleton for the plaintiff at Boston; to be from Castleton forwarded by the defendants by said other common carriers between Castleton and Charlestown and Boston; yet that the defendants did not carry the same to Castleton, or there deliver it to, or forward it by, any other carrier to the plaintiff, or to Charlestown and Boston, but by reason of their negligence and carelessness the same was lost.

The defendants pleaded the general issue, and the cause was tried, by jury, at the March Term, 1858, of the Rutland county court, — PIERPOINT, J., presiding.

That the defendants were common carriers, as alleged in the declaration, was admitted on the trial. The plaintiff introduced evidence tending to prove the following facts: that at Saratoga Springs, on the 17th day of September, 1855, he (by his clerk and agent) delivered to the defendants the box of merchandise described in the declaration, marked and directed to the plaintiff at Boston, Massachusetts, where he resided, for transportation by the defendants over their road on its way to Boston; that the defendants received the box and gave the plaintiff's agent and clerk a receipt therefor, as follows:

"Rec'd, Saratoga Springs, Sept 17, 1855, in apparent good order, 1 box, to forward to Castleton, for N. Y. Brintnall, Boston, Mass., at freight of — per 100 lbs. weight. "

GEO. W. COLE, agent S. & W. R. R. Co."

That the box did not arrive at its place of destination; that it had not been received by the plaintiff at Boston, or elsewhere, but was lost; and that the defendants' road, the Rutland and Washington, the Rutland and Burlington, the Cheshire and

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Fitchburgh and connecting roads, formed a line of railroad communication between Saratoga Springs and Boston.

The plaintiff offered the deposition of A. W. Morrison, which was objected to by the defendants but admitted by the court. The caption of the deposition was as follows:

"The foregoing deposition is taken at the request of Norman Y. Brintnall, to be used in a cause to be heard and tried by the county court to be holden at Rutland within and for the county of Rutland, in the State of Vermont, on the 2d Tuesday of March, 1858, in which case Norman Y. Brintnall is plaintiff, and the Saratoga and Whitehall Railroad Company are defendants. The defendant being out of the State of Vermont is the cause of taking this deposition. The adverse party was notified and did attend, if in the opinion of the court the following facts constituted a sufficient notice and attendance:

Due notice was given to the said Brintnall by the said Saratoga and Whitehall Railroad Company to be present at the time and place when and where the foregoing deposition was taken, to be present at the taking of depositions to be used in the above mentioned cause, and at said time and place the said Saratoga and Whitehall Railroad Company appeared by A. Pond, and the said Norman Y. Brintnall by Charles S. Williams, and a deposition, of which the foregoing deposition is a duplicate, was taken by the said Saratoga and Whitehall Railroad Company, the said A. Pond conducting the examination in behalf of said railroad company, who appeared before me only by him as their agent and attorney. At the said time and at the close of the taking of said deposition, the foregoing deposition was taken at the request of the said Brintnall, the said A. Pond being notified and present, but declining to appear or act in behalf of said railroad company upon the taking of this duplicate deposition, or to consent that the said Brintnall might have the benefit of the deposition of which the above is a duplicate, which had been taken immediately before, claiming that no sufficient notice had been given to the said railroad company to authorize the taking of this deposition. Certified by Samuel B. Peck, justice of the peace."

A Pond, named in the foregoing caption, was not the defendants' attorney of record in this suit.

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The defendants introduced evidence tending to prove that on the receipt of the box of goods it was duly forwarded on its way to Boston, according to its direction ; that it was transported by the defendants over the road to Castleton, and there delivered to the Rutland and Washington Railroad Company in the regular course of its business, and that the Rutland and Washington Railroad formed the next link to the defendants in the chain of railroad communication from Saratoga to Boston.

The court charged the jury that if they found that the defendants received the box of goods, as claimed by the plaintiff, then the defendants were bound to transport it to Castleton, and there deliver it to the Rutland and Washington Railroad Company, it being admitted that this railroad was the next link in the chain of ordinary communication between Saratoga and Boston ; that if the jury were satisfied that the goods were lost, then it was incumbent on the defendants to satisfy them that the goods were so delivered at Castleton, and that if the defendants did so deliver the goods at Castleton, that was all they were required in this case to do. But that if the defendants did not so deliver the goods at Castleton, they were liable in this case, and the plaintiff was entitled to a verdict for their value, unless the defendants were discharged from their liability as common carriers by the "act of God or the public enemy," or by showing that they entered into some special contract in relation to the conveyance of these goods, limiting their liability, or that the plaintiff practised some fraud upon the defendants in relation to the transaction that prevents his recovery.

The jury returned a verdict for the plaintiff for the value of all the goods.

To the foregoing decisions and charge of the court the defendants excepted.

Linsley & Prout, for the defendants.

1. The duplicate deposition of Morrison was not taken in accordance with the act of 1854, (No. 4.) It was taken at Saratoga Springs, where the defendant had its legal existence and does its business. The notice, therefore, should have been given to the defendant ; notice to the attorney in attendance was not

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sufficient. If the case is one that justifies notice to the attorney on the ground that the adverse party resided out of the State, it should have been given to the attorney of record in the cause, by summons, etc.; sec. 2. No. 4, act of 1854.

Again, the notice given was not reasonable; *Stephens v. Thompson et al.*, 28 Vt. 77.

2. The evidence in the case does not prove the contract as alleged in the different counts of the declaration. The jury returned a general verdict upon all the counts.

The first and second counts charge the contract to be to carry to Castleton; the third, to carry to Boston; the fourth, to Charlestown; the fifth, to forward to Castleton and from thence to be forwarded by other carriers, by the defendant, to the plaintiff at Charlestown and Boston. To entitle the plaintiff to recover on all the counts he must prove the contract as laid in each; 2 Greenleaf sec. 299; *Tucker v. Cracklin*, 3 C. L. 394; REDFIELD on Railways (note) p. 284.

The evidence does not warrant the general charge given; it was made applicable to all the counts, without reference to the question whether such was the contract or not, or the effect of the receipt qualifying the defendants' undertaking. The receipt clearly indicates that the defendants did qualify their liability; it shows that they undertook to forward only to Castleton, and excludes the idea of any responsibility, as carriers, beyond that point.

The proof does not obviously meet all the counts, especially the third and fourth, nor the last count, under which the recovery must be had, if any, as the contract is not alleged in that count to be to deliver to other carriers at Castleton, but "*to be forwarded by the defendant, by other carriers.*" The legal conclusion from the facts stated in this count, as well as the two preceding, is that the defendants are liable for the loss of the goods, as carriers, if lost anywhere on the route to Boston; *Tucker v. Cracklin*, 3 C. L. 394; *Vail v. Strong*, 10 Vt. 457.

The goods being marked and directed to Boston is not decisive, and is no evidence of any undertaking to deliver at that place, as the undertaking is limited by the receipt; REDFIELD on Railways (note) 284, 283, 287; 6 Hill 157; 23 Vt. 209.

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The case stands no better upon the first two counts, as those counts do not set forth the contract to be to forward to Castleton, and deliver to the Rutland and Washington Railroad.

So that the charge, as given, corresponds with neither count of the declaration.

3. The court assume, in the charge, that the defendants were bound to deliver to the connecting road. Upon the facts, this was erroneous. The liability of the defendants rests upon the receipt, and the jury should have been so instructed. In the receipt they do not undertake to deliver to the Rutland and Washington Railroad. The legal liability arising, therefore, is to deliver to the owner, and the obligation to deliver to the connecting road cannot be engrafted on the contract by parol; *May v. Babcock*, Ohio 817; *Angell on Carriers* 213, 214, 3 Conn. 9 and 14.

There was no evidence of usage or custom affecting this point.

4. The jury were told that if they were satisfied that the goods was lost, then it was incumbent on the defendants to satisfy them that they were delivered to the Rutland and Washington Railroad, at Castleton. Under this charge, if the jury were satisfied that the goods were lost on one of the lower roads, yet if the defendants were unable to show a delivery at Castleton to the Rutland and Washington Railroad, they were justified in returning the verdict they did. Their attention was not called to the effect of the receipt, limiting the defendants' liability.

The burden of proof was upon the plaintiff to show, either that the goods were lost upon the defendants' road, or that they failed to deliver them to the Rutland and Washington Railroad, as the jury should find the contract. Proof of the loss, unless it is confined to the defendants' road, has no tendency to show that the box was not delivered to the Rutland and Washington Railroad, as such evidence is in no way inconsistent with the supposition that they were lost on the Fitchburg road. The rule laid down by the court, as applied to this case, makes the defendants liable for the negligence of others. If the destination of the goods had been New Orleans, proof that they did not arrive there would make the defendants responsible on this principle; *Sprague v. Smith*, 27 Vt. 421.

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The declaration is in case for negligence; 2 Chitty's Pl. pp. 651 and 356.

In assumpsit it would be sufficient to prove a delivery to the defendants, and thus make them account for the goods, but in *this* form of action the burden is on the plaintiff to show their loss in consequence of some nonfeasance or negligence of the defendants, notwithstanding its negative character; *Day v. Ridley*, 16 Vt. 48; Angell on Carriers, sec. 470, p. 404.

No evidence of this kind was introduced, except proof that the goods did not arrive at Boston. This was too remote.

Proof of the loss is not confined by the court even to the line of communication between Saratoga and Boston. If lost in the hands of a truckman between the depot at Boston and the plaintiff's place of business, the defendants would be liable under the charge.

Pierpoint & Nichols, for the plaintiff.

There was no error in admitting Morrison's deposition.

Both parties were regularly before the magistrate, upon legal notice, for the purpose of taking the deposition of the witness to be used in the cause at the term at which it was tried. And being so before the magistrate, it was the right of the parties to have the deposition so taken that it could be used by either party, and in this case the deposition was so taken and certified.

POLAND, J. The first question made by the defendants' counsel is, that the proof in the court below did not support the declaration, that is, that it did not prove the contract or undertaking of the defendants with the plaintiff as alleged in either count. It was said in the argument that where the declaration contained several counts setting out the plaintiff's cause of action in different ways, to meet any differences that might arise on the proof, or different views of the legal effect of the language of a contract, it would be the duty of the court to direct the attention of the jury, and confine the recovery, to such counts as the proof sustained.

This is undoubtedly true when any such point is made, and when the attention of the court is called to the matter, but when

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no question is raised to the court, and they are not called upon to distinguish between the different counts and the special applicability of the evidence to each, and no objection is made to the admissibility of the evidence upon particular counts, it is not usual for the court to voluntarily assume any such duty, and no exception can be taken because they do not.

The question whether the proof strictly supported any one of the counts in the declaration, we do not regard as properly arising upon these exceptions, for no such question appears to have been made in the court below.

It is a general rule that the court will not revise any questions except such as appear to have been raised in the county court, and this rule applies with peculiar propriety to questions of variance which, if raised in the county court, can generally be removed either by further proof or by amendment.

To allow a party to raise such a question for the first time in the supreme court, would operate usually with great injustice. It has been repeatedly decided by this court, that it cannot be allowed, unless the variance appears of record, and is of such a character that the judgment would not protect the parties in reference to the matter actually litigated; *Peck v. Thompson et al.*, 15 Vt. 687; *Hard v. Brown*, 18 Vt. 87.

It appears by the declaration, and also from the exceptions, that the plaintiff claimed that the receipt given by the defendants for the box of goods, amounted to an undertaking by them to transport it to Boston, and that they would be liable for its loss, though the loss occurred beyond the termination of the defendants' road at Castleton, upon one of the other roads in the line between Castleton and Boston. The defendants claimed that they were only liable for its safe delivery at the end of their own road, at Castleton. The county court, upon this point, held with the defendants, in conformity with what we understand to be the general current of American decisions.

It is said, however, that the court erred in assuming, either with or without proof, that the defendants' undertaking and obligation was to deliver over the box to the Rutland and Washington road, the next road in the line to Boston; that no such thing could be inferred from the receipt of the defendants, and that no

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such thing could legally be proved aside from the receipt. It is not in terms stated in the receipt where, or to whom, the box was to be delivered, but we think it is apparent from the language of the receipt that the box was understood to be destined for Boston, and to be forwarded there by the line of railroad of which the defendants' road formed a part.

It is said that the marks upon the box are not to be understood as a direction of it, but as merely giving the residence of the owner, like a name and residence marked upon a trunk, which ordinarily furnish no indication of its destination. But such marks upon a box of merchandise forwarded by railroad or steamboat, usually, if not universally, indicate its destination in that transit, while the same marks permanently placed upon a trunk, indicate merely the residence of the owner, and remain the same, whether going from or toward his place of residence. Such being the known and understood destination of this box of goods, although the defendants' receipt says nothing as to where or to whom they were to deliver it, the defendants' duty would be to deliver it to the carriers on the connecting road, to be forwarded to its ultimate destination, because this is the usual and ordinary course of business in such cases. If any question had arisen as to this in the county court, evidence would have been admissible to show the ordinary course of business, but it does not appear that any such question was made, or any necessity for such proof, for it appears to have been understood by all parties that the box was received by the defendants to be sent forward to Boston, by railroad, and that they were to deliver it over to the Rutland and Washington road at Castleton, the point of connection. The county court were then abundantly justified in charging the jury as they did, as to the defendants' duty to deliver the box over to the next carrier in the line, and the exceptions do not fairly show any exception to the charge in that respect.

The only point fairly raised by the exceptions to the charge, which is relied upon here, is in reference to the proof incumbent on the plaintiff to make, to establish negligence, *prima facie*, against the defendants, so as to throw upon them the burden of showing the box out of their hands into those of the next carrier. The duty of the defendants was to safely transport the box to

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Castleton, the end of their road, and then deliver it to the next carrier. The negligence alleged in the declaration, the breach of duty complained of, is, that they did not do this; and, of course, in order to establish a right of recovery against the defendants, there must be some proof offered to prove such negligence. It is an affirmative allegation by the plaintiff, and the burden is upon him, though it involves the proof of a negative. It is not enough for the plaintiff to show the box into the hands of the defendants, and throw the burden upon them to prove that they delivered it to the plaintiff, or at its proper destination, under their contract of carriage. But in such cases a plaintiff is only bound to give such proof of the loss as the nature of the case admits of, and fairly is in his power to bring. The fact that he is thus really called upon to prove a negative is not to be lost sight of, nor that ordinarily after the delivery of goods to a carrier, and especially to a railway company, the means of proving what has been done with them, or what has become of them, are wholly within their own power and knowledge, and out of that of the plaintiff. The plaintiff can, and ought always to be required to show, that he has not received his property; that it has been lost. The county court required this to be done by the plaintiff, and held that if this was shown, and that the goods never reached Boston, their ultimate destination, then the burden was on the defendants to show the box out of their hands.

We have had some hesitation and doubt upon this point, but upon more consideration we are satisfied, under the circumstances, that the instruction was correct.

The argument is, that showing the box did not arrive at Boston, the end of the route, but was lost, does not prove or tend to prove the defendants did not deliver it to the next carrier, because it might have been lost between Castleton and Boston. It must be admitted that it is very inconclusive proof of the fact, but still we think it has some tendency to establish it. The box is proved into the hands of the defendants; there is no evidence that anybody else ever had it, or that it was ever in the possession of any other carrier in the line. The usual and ordinary course of things, what is always expected, and what generally proves true is, that goods forwarded upon such a line arrive at their destina-

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tion, and therefore the fact that goods do not arrive at one end of the line, is some evidence they were not sent from the other. It may be said that this reasoning would include the defendants' road as well as the rest of the carriers in the line, but the defendants are proved to have had the box, while there is no proof that either of the others ever did. But we place it upon the ground mainly that this was really all the proof the nature of the case permitted to the plaintiff, and that proof of a delivery by the defendants to the next road was a matter that was peculiarly within the power of the defendants, and not at all in the power of the plaintiff, unless the defendants and the connecting roads preserved evidence of the transfers of all freight from one road to the other.

It is well understood that in the carriage of freight over a long line, made up of several different roads, it is not usually exchanged from the cars of one road to those of another, but that each road furnish their proportion of cars, and they are run over the whole line. In such cases, unless the respective roads keep some record or evidence of the freight that in fact goes over their roads in this way, it would be next to impossible for the forwarder, in case of loss, to ever show where it occurred. If the respective roads do keep such evidence, then they have always the power to show freight out of their hands into that of the next in the line. In either event it seems just and reasonable that the road receiving the freight, or any other into whose hands it is proved, in case an ultimate loss is shown by the owner, should be required to show it out of their hands. These views seem to be supported by the case of *Day et al. v. Ridley et al.*, 16 Vt. 48. In that case the defendants, who were carriers, received of the plaintiffs a quantity of oil meal, to be carried by their boat from Burlington to Troy. The boat was capsized on the lake in a storm. A part of the casks of meal were landed at Essex, N. Y., and, as the case states, there was no evidence given what became of them. The defendants' counsel claimed that the burden of proof was on the plaintiffs to show that the meal was not delivered at Troy, its place of destination, and that for want of such proof the plaintiffs could not recover for this part of the goods. But the supreme court held that this was sufficient evidence to throw the burden upon the defendants.

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WILLIAMS, Ch. J., who delivered the opinion, says, "it was necessary for the plaintiffs to give some evidence of loss, and thus far the burden of proof was on them. The burden of proof may be turned on the defendants, however, by slight proof."

The only remaining point arising upon the exceptions, is the correctness of the admission of Morrison's deposition.

The deposition purports on its face to be a deposition taken on behalf of the plaintiff, and was offered and admitted as such. In order to make it admissible, therefore, it must have been taken in pursuance of the provisions of our statute in relation to the taking of depositions. The act of 1854 requires that all depositions shall be taken with notice, and expressly provides that none shall be read in evidence unless notice be given as provided by that act. The notice required is either a personal notice to the adverse party by the magistrate taking the deposition, or by a citation served on the adverse party, or his attorney, in case the party lives out of the State.

We think this deposition was inadmissible for two reasons.

1. That Pond was not the attorney of the defendants in any such sense as authorizes a notice to be given to him. It must mean the attorney in the cause, and it is not claimed that Pond was, and if he was employed by the defendants to take a deposition, which is all that appears here, that was not enough.

2. We think the fair inference from the deposition is, that the notice to Pond was a verbal notice from the magistrate merely. It is clear from the statute that notice to an attorney can only be given by a citation, duly served, and that notice can only be given verbally to the party himself. We are unable to see how the legal question is varied by the particular circumstances under which this deposition was taken. The magistrate could not make a mere duplicate of the deposition evidence for the other party, except by taking it as the statute requires. We regret this result, as under the circumstances it would seem the defendants ought not to be allowed to object to the plaintiff using a copy of their own deposition, but we feel that it is unavoidable under the strict rules that have always been held upon the subject.

The judgment of the county court is reversed, and the case remanded for a new trial.

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JOHN STEARNS v. THE ADMINISTRATOR OF SARAH STEARNS.

Pleading. Statute of Limitations. Judgment.

An omission of the formal concluding words of a pleading cannot be taken advantage of by a motion in arrest of judgment ; it can only be objected to by special demurrer.

Where a fact alleged in the plea may be true and yet be no bar to the action, a denial of that fact in the words of the plea (omitting to answer other material allegations), forms an immaterial issue ; but when the fact pleaded is a good defense to the action, and that fact is traversed in the words of the plea, the traverse is sufficient.

An agreement by the maker of a promissory note, before the statute of limitations has run upon it, "that he will not take any advantage of the statute of limitations on the note." is an acknowledgement of the debt sufficient to take it out of the statute.

Such agreement need not be pleaded by way of estoppel, but may be shown in evidence under a traverse of the plea setting up the statute bar.

Where a question is brought before a judicial tribunal having jurisdiction of the matter, and is there decided, the decision, in the absence of evidence to the contrary, must be presumed to be upon the merits of the controversy and a final settlement of it.

The plaintiff, in an action on book account, presented before the auditor certain matters for adjustment and allowance which were passed upon by the auditor, apparently on their merits, and his report thereon was accepted by the court. The defendant declared in offset upon two promissory notes made by the plaintiff, to which the plaintiff pleaded payment. To support his plea, the plaintiff gave evidence tending to show a payment, but in no other manner than by the same matters which he had so presented before the auditor ; *Held*, that the auditor's adjudication upon those matters was final and barred the plaintiff from applying them on the notes.

APPEAL by the plaintiff from the decision of commissioners of the probate court, allowing a claim in offset against him in favor of the defendant.

Declaration by the plaintiff on book account. Declaration by the defendant in offset upon two promissory notes made by the plaintiff to Sarah Stearns, in her life time. Plea by the plaintiff, "that after the making of the said several promises, in said declaration in offset mentioned, and previous to the decease of said Sarah Stearns, to wit : on the first day of January, A. D.,

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1851, he paid to said Sarah Stearns all and every the sums of money in said declaration in offset mentioned." The plaintiff also pleaded the statute of limitations. To the plea of payment the defendant replied, "that the said John Stearns did not, on the first day of January, A. D., 1851, pay to said Sarah Stearns all and every the sums of money in said declaration in offset mentioned." To the plea of the statute of limitations the defendant replied, negating the words of the plea, but omitting the formal conclusion, "and this he prays may be inquired of by the country."

Trial upon the offset, by jury, at the September Term, 1859, of the Rutland County Court. PIERPOINT, J., presiding.

The defendant introduced in evidence the two notes described in his declaration in offset, with certain endorsements thereon; and in answer to the plaintiff's defense thereto of the statute of limitations, gave evidence tending to show that in July, 1847, shortly before the expiration of six years after the maturity of the notes, one Conant, an agent of the defendant's intestate, requested the plaintiff to renew them, and told him that unless he did so they would be put in suit. To this the plaintiff replied, that he did not want them sued, and then agreed that he would not take any advantage of the statute of limitations on the notes. It did not appear that anything more was done by way of enforcing their payment during the life-time of the deceased, who died in 1852.

On the issue of payment the plaintiff gave evidence tending to show a payment of the notes, but in no other manner than by certain matters, a claim for which he had made against the estate of the deceased, and which he had presented to the commissioners thereon for allowance, and which he had also presented before the auditor in this case for adjudication and allowance, and which had been passed upon by him. The defendant read in evidence the auditor's report, with the record showing it to have been accepted by the court. (All that is material in the auditor's report is sufficiently mentioned in the opinion of the court.) The specification of the respective claims of the parties, presented to the auditor and returned by him, appear to have been lost.

The plaintiff requested the court to charge the jury, that the

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testimony on the part of the defendant was not sufficient to remove the statute bar, if believed ; that if the testimony of the plaintiff was believed, the note's had been paid, and the jury should find a verdict accordingly ; that if the items which said Stearns presented before the auditor and were adjudicated by him, had been paid or delivered by said John Stearns to said Sarah Stearns in payment of the notes, such adjudication would not prevent the said John Stearns from pleading them in payment to these notes, in this case.

But the court declined to charge the jury as requested, except as follows : that the notes in question on their face were barred by the statute of limitations, and that to remove the effect of the statute it was necessary for the defendant to show to the satisfaction of the jury that within the time limited by the statute (which time was explained to the jury, and about which there was no controversy,) prior to the decease of the said Sarah Stearns, the plaintiff had promised to pay the notes, or had acknowledged his then present indebtedness and liability thereon, and a willingness to remain liable and to subsequently pay them ; that an acknowledgement of the debt alone, or an acknowledgement accompanied with an expressed unwillingness to remain liable, or to pay, would not be sufficient ; that it was a question for the jury to determine whether, in this case, such an acknowledgement had been proved : that in determining this question they should consider the evidence relating to the interview between the plaintiff and Conant ; and, if they believed the facts to have existed as the evidence tended to show, that what the plaintiff said in relation to this debt, and his agreement, not to take advantage of the statute, was evidence tending to show an acknowledgement of an existing debt and of a willingness to remain liable. How much weight was to be given to it was for the jury to say.

The court also told the jury that if they found that Conant went to the plaintiff to get the notes renewed, at the request of the deceased, as the testimony tended to show, and made known his purpose, and the plaintiff knew that his object was to get the notes renewed to avoid the effect of the statute, if he then agreed that he would not take advantage of the statute, and the

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deceased, on being informed of it, relied on such agreement and suffered the time limited by statute to elapse, when she otherwise would not, the plaintiff cannot now set up the statute as a bar to this claim in violation of that agreement so relied and acted upon.

The court also instructed the jury, that if, from all the evidence, they were satisfied that the notes in question had been paid, the plaintiff was entitled to a verdict; that if the plaintiff had claims against the deceased, that, if just, were of such a character that by reason of some understanding between them he might insist upon having them applied in payment of the notes in question, still, if after her decease he had presented a claim therefor against the estate, before the commissioners, and subsequently before the auditor, and had insisted upon their adjustment and allowance then, and a hearing had been had upon their merits, and they had been allowed and adjusted in the settlement of the book accounts between the parties, or had been disallowed on the ground that they were unjust, or upon any other ground involving the merits of the claims; in that case the plaintiff would be bound by such determination of the auditor, and could not afterwards claim to have the same matters applied in payment of these notes. On the other hand, if the auditor had rejected the claims on the ground that they were matters that, by agreement of the parties, were to be applied in payment of these notes, and therefore not proper matters to be settled in that accounting, that would not preclude the party from insisting upon the claims being applied in payment of the notes.

Verdict for the defendant for the full amount of the notes, deducting the endorsements.

To the charge of the court, and their refusal to charge as requested, the plaintiff excepted.

After verdict for the defendant, and upon judgment, the plaintiff moved that the judgment be arrested and a repleader awarded, because the issue tried upon the pleas of the statute of limitations and payment were immaterial, and no judgment could be rendered upon the verdict. This motion was overruled by the court to which the plaintiff excepted.

F. Potter for the plaintiff.

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J. B. Bromley, and E. Edgerton for the defendant.

ALDIS, J. I. The plaintiff moves in arrest of judgment. To the defendant's declaration in offset upon two promissory notes, the plaintiff pleaded the statute of limitations, the defendant replied that the cause of action did accrue, &c., negating the words of the plea, but omitted the formal words of the conclusion, "and this he prays may be inquired of by the country." Upon these pleadings the parties had a trial by jury and the defendant obtained a judgment upon the notes. The motion in arrest is upon the ground of the omission of the formal concluding words of the replication.

By the statute of 4 and 5 ANN, a wrong or defective conclusion can only be objected to by special demurrer. It is, therefore, not to be taken advantage of by a motion in arrest. To hold, that a party who has had his trial by jury and been cast in the verdict, may arrest the judgment because his adversary omitted the formal request for such a trial, would seem in these days like a burlesque upon judicial proceedings.

It is also claimed that the issue joined upon the plea of payment, was merely upon the day specially named in the plea, and not upon the fact of payment; and therefore that the issue was immaterial.

Where a fact alleged in a plea may be true and yet be no bar to the action, there a denial of that fact, in the words of the plea, and omitting to answer other material allegations, forms an immaterial issue. But where the fact pleaded is a good defense to the suit, and that fact is traversed in the words of the plea, such traverse is sufficient. Here the payment after the debt was due is denied in the terms in which it is alleged; thus forming a direct and material issue. The motion in arrest is, therefore, overruled.

II. The plaintiff pleaded the statute of limitations. On this issue the defendant showed that the plaintiff within six years agreed "that he would not take any advantage of the statute of limitations on the notes." In *Button v. Stevens*, 24 Vt., 131, the question came before this court upon these very words. The court held that these words are an acknowledgement of the debt

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sufficient to take it out of the statute, and that the agreement need not be pleaded by way of estoppel, but may be shown in evidence under the issue formed by traversing the plea. The opinion of Judge ISHAM reviews the authorities and shows that the decisions in England and in the State of New York correspond with our own.

III. To support the plea of payment the plaintiff gave evidence of certain matters which he claimed to have apply as payment, which he had previously presented before the auditor for allowance in his action on book against this defendant, and which were passed upon by the auditor. It appears from the bill of exceptions that the report of the auditor was accepted by the court. The claim of the plaintiff here is that there was no testimony tending to show that the matters he claimed before the auditor were either allowed or rejected upon their merits; and as they might have been disallowed on some mere technical point, the plaintiff should be allowed to have them apply as payment unless the defendant shows affirmatively that the decision of the auditor was upon their merits.

But we think the *prima facie* presumption of law is to the contrary, viz: that where a question is brought before a judicial tribunal having jurisdiction of the matter and is there decided, the decision is to be presumed to be upon the merits of the controversy, and to be a final settlement of it. The contrary, if claimed, must be made to appear by due proof. Public policy requires this presumption, that there may be an end to litigation: and experience shows that in the ordinary administration of justice the fact corresponds with the legal presumption.

The court below did not rest the case upon this point, but told the jury that they might consider the evidence, and if they found that the auditor had either allowed or disallowed the plaintiff's claims upon their merits that would be a final determination and bar the plaintiff from claiming them here.

Referring to the auditor's report we find that the auditor specially sets forth the facts upon which the claims of the parties rested, and the objections made by the plaintiff to the defendant's account; but does not state that any mere technical question was raised as to the plaintiff's right of recovery, and would seem to

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have passed upon the substantial justice of the accounts. As it would have been his duty to have set forth in his special report the grounds upon which he acted, if he disallowed the plaintiff's account for reasons not affecting their justice, we think the conclusion fairly to be drawn from the report is, that he decided the case upon its merits.

In this view of the charge of the court we find no error.

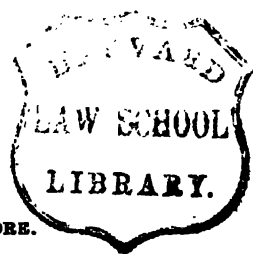
IV. It is further claimed that if these matters were finally determined by the auditor, still if they were to apply as payment they ought so to apply, and the notes having been paid cannot by that determination be revived so as to become a cause of action. The court charged, first, that if the notes had been paid the defendant could not recover on them in his declaration in offset; second, but if the plaintiff had claims which by agreement he claimed ought to have applied in payment, and he submitted them to the auditor, and he adjudicated upon them upon their merits, that adjudication would be final, and bar the plaintiff from now applying them on the notes. Upon this charge the jury must have found that the auditor did not disallow the accounts upon the ground that they were payments on the notes and therefore not allowable.

The plaintiff cites the cases where a party suing upon a note has recovered judgment for its full amount, and afterwards being sued in account by the maker of the note has been allowed to defeat the action by showing that the items were delivered in payment on the notes, though not so applied when the judgment was rendered. These cases differ entirely from the case at bar. They go upon the ground that the payments should have been shown in the suit upon the note, that they operate to extinguish a debt and, therefore, cannot be chargeable on book; and that to allow a recovery for them upon the ground that they had not been allowed in the judgment on the note would be to impeach that judgment collaterally. In this case the verdict stands upon the ground that the accounts claimed have not been paid upon the note; but that the plaintiff claimed that by some understanding between him and the defendant he had the right to insist on such an application, but that, instead of so doing, he has submitted them for adjudication to the auditor, by whose determin-

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ation they had finally been settled. The claim of the plaintiff here infringes upon the principle of the cases cited by him to sustain it; for to allow his accounts now to apply in payment on the note, would be to impeach collaterally the judgment rendered upon the auditor's report. Payments on notes are not recoverable on book, though the judgments on the notes do not include them; because the party might have had them applied by defending the suit on the note. Clearly then where a party has defended an action of book account and failed, or succeeded, in his claims upon their merits, (and whether he failed or succeeded does not appear) he cannot be allowed to contest the same matters over again in an action brought against him upon the note.

The judgment is affirmed.



AMOS DOUGLASS v. ALONZO WHITTEMORE.

Construction of deeds. Water privilege.

H. conveyed to W., the defendant, five acres of land, on which was situated a grist mill supplied with water by means of a dam and flume also situated upon the premises conveyed. Above this dam was a stump standing in the water, being the same referred to in the conveyance to the defendant and also in the deed to the plaintiff hereafter mentioned. By the above conveyance was granted to the defendant "the right to control the water for the purpose of a grist mill to the top of a certain stump of a tree standing in the water above the dam, and the said W. is to keep the present dam in good repair at its present original height, reserving to myself (the grantor) and heirs the right of drawing water from the dam or flume, not to interfere with the grist mill privileges in any shape or way, for any purpose I may think proper until the water is drawn down to the top of a stump formerly called low water mark." Subsequently H. conveyed to D., the plaintiff, an acre of ground on which was situate a saw mill, depending for water on the same source as the grist mill above mentioned, located below the grist mill and further from the dam and flume, "together with the right of drawing water for the use of said saw mill or other machinery attached thereto from the dam or flume, until the water may be or shall settle to the level of the top of a certain stump formerly called low water mark, said water to be drawn and used for said saw mill and any other purpose not inconsistent with water privileges

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heretofore granted." For the purpose of exercising the right of drawing water for the use of his saw mill, as granted in his deed, the plaintiff inserted a water gate in the side of the flume, the bottom of which was twenty-one inches below the level of the top of the stump, called low water mark, and five feet above the bottom of the flume. The defendant, denying the plaintiff's right to insert a gate in the flume lower than the level of the top of the stump, shut off the water from the flume by a head gate whenever the plaintiff attempted to draw water through the gate inserted by him in the flume, although the water in the pond was all the time above the level of the top of the stump;

Held, that whether the use of the gate, as it was inserted by the plaintiff would interfere with "the grist mill privileges" when reasonably exercised, was a question of fact to be determined by a jury, under proper instructions, in a case before them on that point.

Held, also, that unless it would so interfere, it was a violation of the plaintiff's rights for the defendant to shut off the water from the flume, while it was above the low water mark; and

Held, also, that if it would thus interfere, *quere*, whether the defendant would have the right to resort to such a method of preventing it.

CASE for obstructing and disturbing the plaintiff in the use and enjoyment of a water privilege for his saw mill. Plea the general issue and trial by jury at the March Term, 1859, of the Rutland county court,—PIERPOINT, J., presiding.

The testimony on the part of the plaintiff tended to show that a certain grist mill and a certain saw mill, situated in the village of Hortonville and town of Hubbardton, were each worked by water supplied by means of a stone dam across the outlet of a pond about two miles long and of an average width of three-fourths of a mile, called Horton Pond; that the dam was above and near the grist mill, and the saw mill was on the outlet about thirty rods below the dam; that a flume extended from the dam into a bulk head connected with the grist mill, the flume being sixty-nine feet in length, including the bulk head therein which was thirty feet long; that there was an old dam formerly built across the outlet about seven rods above the stone dam, and a certain stump standing in the water above and near the old dam, the top of which stump was formerly called low water mark. That the saw mill and grist mill had both been owned and occupied by Gideon Horton, and, after his decease, by his son, Rollin V. R. Horton, for a period altogether of more than thirty years, and until the conveyance of the saw mill to the

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plaintiff, and of the grist mill to the defendant, as hereafter mentioned.

The plaintiff then showed that he owned and occupied the saw mill and its appurtenances under a deed from Rollin V. R. Horton and wife, dated September 20th, 1856, which conveyed to him about one acre of land, upon which the saw mill was situated, together with a certain right of drawing water from the stone dam or flume above mentioned, for the use of the saw mill, until the water in the pond should settle to the level of the top of a certain stump, called low water mark, subject to water privileges theretofore granted. The terms in which this right was granted are recited in the opinion of the court.

The plaintiff's evidence further tended to show that in the latter part of the month of June, 1857, he applied to the defendant to select a place in the flume where he would prefer to have a water gate put for the purpose of drawing water therefrom for the use of the plaintiff's saw mill, there being then no such gate in the flume; that the defendant declined to indicate any preference, and the plaintiff thereupon put a water gate into the flume, fifteen feet below the stone dam, which gate was five feet above the bottom of the flume and twenty-one inches below the level of the top of the stump called low water mark; that the defendant objected to the use of the gate, and on the 10th day of July, 1857, and at various other times between that day and the time of the commencement of this suit, whenever the plaintiff raised his gate, shut down and closed the head gate of the flume, which was above the plaintiff's gate, for the purpose of preventing, and thereby did prevent, the plaintiff from drawing any water from the pond, through his gate, for the use of his saw mill; and that from the time when the plaintiff put in his gate until the commencement of this suit, the water in the pond was always on a level at least eighteen inches higher than the top of the stump called low water mark, and that during all that time the plaintiff was deprived of the use of his saw mill, from want of the water necessary for working it.

The defendant introduced in evidence a deed from Rollin V. R. Horton and wife to himself, dated November 5th, 1855, conveying about five acres of land, upon which the grist mill, stone dam

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and flume were situated, and containing a reservaion of a certain water privilege for the saw mill. The material portions of this deed are recited in the opinion. It was conceded that the top of the flume was about two feet higher than the level of the top of the stump, and that the stone dam was higher than the top of the flume. The identity of the stump, of which evidence was introduced, with that mentioned in the deed to the plaintiff, and with that twice referred to in the defendant's deed, was also conceded.

The court ruled, *pro forma*, that, in view of the respective conveyances above mentioned, the plaintiff, for the purpose of drawing water for the use of said saw mill, had no right to put a water gate into the defendant's flume with a bottom lower than the level of the top of the stump called low water mark; and that if the bottom of the water gate which the plaintiff put into said flume was lower than such level, the plaintiff had no right, without the consent of the defendant, to make any use of said gate for the purpose of drawing water for the use of his saw mill, although the water in said pond might be higher than said level; and that the defendant had a right to close and shut down the head gate of said flume, and to keep said head gate closed and shut down, if it was necessary to prevent the plaintiff's using his said gate; and directed a verdict for the defendant, to which the plaintiff excepted.

Linsley & Prout, for the plaintiff.

Briggs & Nicholson, for the defendant.

BARRETT, J. The decision of the case depends upon the construction to be given to the deeds, by virtue of which the parties hold their respective rights and interests in the water privilege, and the use of the water in question. They both hold under deeds from R. V. R. Horton, who conveyed to the defendant, November 5th, 1855, about five acres of land, on which the grist mill, stone dam and flume were situated, "with the right to control the water for the purposes of a grist mill to the top of a certain stump of a tree standing in the water near the old flume and in or near the dam of said old flume and the said Alonzo (the defendant) is to keep the present dam in good repair at its

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present or original height; reserving to myself and heirs the right of drawing water from the stone dam or flume not to interfere with the grist mill privileges in any shape or way for any purpose I may think proper until the water is drawn down to the top of a stump formerly called low water mark."

Said Horton, September 20th, 1856, conveyed to the plaintiff the saw mill premises, depending for water on the same source as said grist mill, situated below said grist mill, and further from said dam and flume, "together with the right of drawing water for the use of said saw mill or other machinery attached thereto from the stone dam or flume at the outlet of the pond above the grist mill until the water may be or shall settle to the level of the top of a certain stump standing in the water near the old flume formerly called low water mark, said water to be drawn and used for said saw mill and any other purpose not inconsistent with water privileges heretofore granted," etc.

It is obvious that Horton conveyed to the plaintiff the rights and privileges which he had reserved to himself in his deed to the defendant. The plaintiff concedes that he stands solely on the rights thus reserved.

For the purpose of exercising and enjoying, in the service of his saw mill, the right of drawing the water "until it is drawn down to said low water mark," he inserted a gate in the side of the flume, the bottom of which is twenty-one inches below said low water mark, but is five feet above the bottom of the flume. Through this gate he attempted to draw water for the use of his saw mill.

The defendant, denying the plaintiff's right to insert a gate below the level of said low water mark, shut off, by a head gate, the water from the flume whenever the plaintiff undertook to draw water through the gate thus inserted into the flume by him.

The defendant claims that he has the exclusive right to all the water, as a mass, that lies below the level of said low water mark, and that the plaintiff has the right to use only from the upper stratum, limited downward by said low water mark; and, therefore, that when the plaintiff, through his gate, draws water that lies below said low water mark, he takes specific water that the defendant has the exclusive right to.

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On the other hand, the plaintiff claims that he has the right to take water from the dam or flume in any way to serve his purposes, till the water shall have settled to said low water mark, provided he does it in a way "not to interfere with the grist mill privileges;" that the defendant's right is not to be gauged from the bottom upwards to low water mark, and that it becomes an exclusive right to any particular water only when the water in the pond shall have settled to said low water mark.

It can hardly be doubted that while the deed to the defendant was designed to convey to him an unimpeded grist mill privilege, and to that end an exclusive right to the water after it should have settled to low water mark, the reservation in the same instrument was designed to secure to the grantor the free use of the water when above the said mark, subject only to the provision that such use should "not interfere with the grist mill privileges." We deem the language of the deed to the defendant, both in the granting part and in the reservation, in its ordinary sense and force, to be quite explicit to this effect. To give it a different meaning would seem to require a forced construction in contravention of settled rules.

If the language rendered doubtful the force and effect to be given to the conveyance and the reservation, it would obviously be the duty of the court to make such a construction as would at the same time secure to the defendant the full beneficial use of the grant to him, and render the reservation as beneficial to the party making it as it could be. In our opinion the construction claimed by the defendant would tend greatly to impair the usefulness of the reservation, while it is not evident nor does it seem probable that such a construction is necessary in order to ensure to him the full beneficial use of his grist mill privileges. Whether so or not cannot be determined as matter of law upon any known principles of hydrostatics or hydraulics. Whether the gate as it was inserted by the plaintiff would interfere with the use of the *grist mill privileges* must therefore rest as a question of fact, to be determined by a jury, under proper instructions, in a case properly before them on that point. Unless it would so, then upon the construction we now give to the deeds in question, it would be a violation of the plaintiff's rights for the defendant to shut

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off the water from the flume, while it was above low water mark. And even if it would thus interfere, it may be questionable whether the defendant would be warranted in resorting to such a mode of preventing it.

The views thus expressed imply what in our opinion should be the effect of the terms of the grant and reservation in the deed to the defendant, viz: that the *grist mill privileges* have precedence of those of the saw mill, when necessary for their reasonable enjoyment, in respect to the use of the water when it is above low water mark; but that the defendant would be bound to exercise his right in that respect in a manner not needlessly to interfere with or impede the beneficial enjoyment of the water by the plaintiff for the use of his saw mill. Down to the point of interfering with "the privileges of the grist mill" when reasonably exercised, we think the plaintiff has the right to the free use of the water in common with the defendant, for all the purposes falling within the scope of said reservation, when it is above said low water mark.

The result is that the judgment of the county court is reversed, and the case remanded.

JAMES RICE v. JACOB C. ANDREWS.*Officer. Action. Credit.*

An officer is not precluded from recovering the price of an article of his own property, which he has sold at auction at the same time and place with other property of the same kind, which he has taken and advertised on an execution, by the fact that the purchaser bought it supposing it to be the property of the execution debtor, nor by the sheriff's neglect to disclose that such was not the fact.

If the giving of a credit for the price of property sold is on the condition that the purchaser's note, with a surety, be given therefor, and this condition is not complied with, but the property is taken by the purchaser, he is liable for the price before the expiration of the proposed term of credit.

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BOOK ACCOUNT.—The only item in the plaintiff's account disputed by the defendant was a charge of seven dollars and thirty cents for a harrow sold by the former to the latter.

It appeared that the plaintiff, who was a deputy sheriff, had taken upon an execution against a townsman of himself and the defendant a large quantity of farming tools, &c., and among them three or four harrows; that he advertised this property for sale upon such execution, and on the appointed day sold it at auction; that the harrow charged to the defendant was in fact the property of the plaintiff, and had not been taken upon the execution above referred to, but that the defendant supposed otherwise; that the plaintiff was desirous of selling it, and procuring another and carried it to the place of sale for the purpose of disposing of it at auction with the property taken on execution; that he made no representations at the time of the sale in relation to it, and neither said nor did anything to induce any person to buy it, except to carry it there and set it up for sale with the other property, but that he requested a person present at the sale, who knew it was his property, not to mention that fact; that the defendant bid it off at the price charged, supposing it to be part of the property taken on the execution and not to belong to the plaintiff: that it was not a very good harrow, and that the defendant after keeping it about two weeks, without using it, on learning that it had been the plaintiff's property and not that of the execution debtor, carried it back to the plaintiff and left it on his premises, giving him notice that he should not keep it, or pay for it.

It further appeared, that at the auction sale the plaintiff announced publicly that a credit of sixty days would be given to the purchasers upon their executing to the plaintiff a note, running that length of time, with a good surety, for the amount of their respective purchases, but that the defendant in some way, but not from the plaintiff, derived the impression that no surety or note was required, but that a credit of sixty days was given, and that he bought the harrow in question with that understanding on his part, and gave no note for it, but that the plaintiff did not know of his carrying it away when he did, and did not consent to his taking it without executing a note with a surety for the price.

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This action was brought before the expiration of sixty days from the time of the sale.

It further appeared that after the defendant had returned the harrow to the plaintiff as above mentioned, the latter applied to the former for a note at sixty days for the amount of his bid for it, which the defendant refused to give.

Upon these facts, the County Court, at the September Term, 1859, PIERPOINT, J., presiding, rendered judgment for the plaintiff for the amount of his account, to which the defendant excepted.

D. E. Nicholson and *Fayette Potter*, for the defendant.

J. B. Bromley and *Briggs & Nicholson* for the plaintiff.

REDFIELD, Ch. J., I. The first question made in the present case is, whether a sheriff, having advertised property for sale on execution, and selling property of his own, at auction, at the same time and place, of the same kind advertised, and without making known that it is not the property advertised on the execution, the bidder supposing it is, and bidding with that belief, is on that account precluded from recovering the price of the property so sold.

There is nothing in the present case to show that the proceedings of the sheriff, in any way interfered with the sale upon the execution, unless that is to be inferred from the facts stated. We are not prepared to say that the facts above detailed show any such official misconduct, as to preclude the recovery of the price of the articles so sold. It is certain that the sheriff might, without impropriety, take advantage of the collection of people to sell any other articles, at the same time, if it was done without interfering with his official sales. He owes no duty, in regard to his official sales, beyond the parties to the precept upon which the sale is made. If they are not in any way injured, others cannot perhaps legally complain. For since the sheriff owes them no duty, they cannot complain of mere nonfeasance. Nor can they complain of any misfeasance, unless it amounts to a legal fraud upon them.

There is nothing of legal fraud in the mere silence of the

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plaintiff, even when such silence operates to bring the defendant, or others, into a delusion, unless such delusion is a fraudulent deception. We are not aware that the bidder, at an auction, is entitled to claim that he shall be truly informed in regard to the ownership of the articles sold, unless that of itself affects the price, provided the purchaser gets a good title. Works of art are often affected by having belonged to a particular cabinet, and in such cases it has been held that if the seller suffers the purchaser to fall into a delusion, in regard to pictures, for instance, having belonged to a particular cabinet, by silence merely, when he knows the delusion enhances the price of the pictures in the estimation of the purchaser, it is a legal, or actionable, fraud. This is expressly so decided in *Hill v. Gray*, 2 Eng. C. Law, 459. It does not appear how the former ownership of a harrow should fairly affect its market value. And it does not appear that the plaintiff was aware that the defendant was acting upon any such conceit. We cannot, therefore, regard the plaintiff's silence, under the circumstances, as a fraud upon the defendant.

I could conceive that a sheriff, who should undertake to excite the commiseration of the bidders, in favor of a poor debtor, and take advantage of the enthusiasm to sell his own wares, might justly be characterized as a heartless charlatan and a knave; but nothing of this kind is pretended in the present case. So, too, if a sheriff should really bring his own goods into competition with those of the debtor, at a sheriff's sale, held by himself, it would be regarded as a very flagrant departure, both from duty and decency. But nothing of this kind appears; and there is no pretence of misrepresentation or known secret defects in the article sold, so as to entitle the defendant to rescind on the ground of fraud.

II. In regard to the term of credit, we think that was not absolute, but only conditional, depending upon the giving a note with surety. And when a term of credit is offered to those who give notes with approved endorers, it is, from its very nature, dependent upon the giving of the security. The security is the consideration for the credit, and when the one fails, the other may lawfully be withdrawn. The rule of construction is different generally,

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when the debtor is only required to give his own note, and especially when the debtor has an election as to the term of credit, and he is not asked to make an election. This was so decided in *Scott v. Montagu*, 16 Vt. 164.

Judgment affirmed.

ROBERT H. SMITH *et al.* v. HIEL HOLLISTER.

Evidence. Pleading. Variance. Slander. Partnership. Jury.

An association of individuals in trade, under the name of the New England Protective Union, Division No. 230," brought an action for slander against H. On the trial, H., for the purpose of proving that B., one of the plaintiffs of record, was not a member of the association, offered in evidence a written admission to that effect, drawn up by H.'s attorneys in the case, signed and sworn to by B.; *Held*, that it was admissible.

The plaintiffs, to rebut evidence introduced by the defendant tending to prove that W., another of the plaintiffs of record, was not a member of the association, offered a paper signed by the wife of W., in his name; it did not appear that it was signed by her with the assent or knowledge of W., her husband, though it did appear that when the paper was first drawn, W. refused to sign it. This paper, it appeared, was used by her for the purpose of withdrawing from the association the eight dollars (the sum required to be paid by members on joining it,) which she had previously paid in, and with it an order was obtained for the withdrawal of the money; *Held*, that the paper was inadmissible.

The defendant's evidence tended to show that B. and W. were not members of the association; evidence tending to show that they were members was introduced by the plaintiffs; *Held*, that it was properly submitted to the jury, as a matter of fact, to determine whether or not they were members, and that in determining the question, their intent and understanding in relation thereto, at the time they were alleged to have become members, as gathered from the evidence, was a material consideration for the jury.

Averments were introduced into the declaration of words spoken by the defendant imputing dishonesty to L., the name of L. being followed by the *innuendo*, "meaning the plaintiff's agent and clerk;" but there was nothing

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else in the declaration showing any connection between L. and the plaintiffs; *Held*, that in the absence of a direct averment connecting L. with the plaintiffs, or their business, the words alleged to have been spoken concerning him were not actionable in favor of the plaintiffs.

To maintain an action for slander, the substance of the alleged charge must be proved in substantially the same words laid in the declaration. Any mere variation in the form of expression only, is not material, but the words alleged cannot be proved by showing that the defendant expressed the *same meaning* in different words. It is not necessary, however, to prove all the words laid, unless the omission of those not proved would so vary the meaning of the others as to make the charge as proved a different one from that alleged.

CASE for slander. The substance of the several counts of the declaration was, that at the time of the committing of the grievances therein mentioned, the plaintiffs were merchants, doing business in Pawlet, under the name of the "New England Protective Union, Division No. 280," and that the defendant, on the 27th day of August, 1855, and on divers days between that time and the commencement of this suit, to injure them in their business and credit, falsely and maliciously said of them, "Division No. 280 (meaning the plaintiffs) must run under at least two thousand dollars; they must run out; I will use them up; they owe at least eighteen hundred dollars in Boston, and as much in New York; O. H. Simonds (meaning one of the plaintiffs) is not worth anything, and Horatio Hollister (meaning one of the plaintiffs) is not worth much, and he (the defendant) did not consider said Division safe; it (meaning the plaintiffs' store) will be shut up;" that on the day and year aforesaid, the defendant spoke certain other false and malicious words of the plaintiffs, that is to say, "the Division (meaning the plaintiffs' store) is attached and closed, and they (the plaintiffs) are not doing business now, and Lincoln (meaning the plaintiffs' agent and clerk) is not fit to be trusted with any business, and has not an honest hair in his head, nor an honest thread in his clothes, and the whole business (of the plaintiffs) is conducted dishonestly;" that on the day and year above mentioned, the defendant also falsely and maliciously spoke of the plaintiffs as follows: "the Union Store (meaning the plaintiffs') cannot borrow twenty dollars of any one; they cannot pay their debts;" that on the

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same day and year, the defendant spoke other false and defamatory words concerning the plaintiffs, as follows: "the store (meaning the store of the plaintiffs) will fail, and they (meaning the plaintiffs) cannot get trusted in market a dollar; they are cheating the people that traded with them; they are bankrupt, and Lincoln (meaning the plaintiffs' agent and clerk) is a scoundrel, and always was, and would play a trick on the people at the last end; they (meaning the plaintiffs) are bankrupt; they (meaning the plaintiffs) are cheating the people, and it (meaning the plaintiffs' firm) is a dishonest concern."

On the trial, by jury, at the September Term, 1859,—ALDIS, J., presiding,—the plaintiffs introduced evidence tending to show that, at the time the defamatory words set forth in the declaration were spoken, they were owners of a store in Pawlet, and were trading under the name and style of the "New England Protective Union, Division No. 230," together with proof of the uttering and publishing of the slanderous words alleged. The evidence tended to prove that the defendant said, "Division 230 must fail; I know it is so; they can't get trusted a dollar: the company is a bankrupt; they can't pay their debts; the company is a dishonest, rotten concern." Evidence was also given to prove the words spoken, as follows: "the store is involved, and in debt in New York and Boston; I am on a note for them and have requested my name to be taken off; they must eventually come down; they cannot borrow money; the store is unable to pay its debts." Also, evidence tending to prove that Hollister said, "that the store was the rottenest, dishonestest piece of business ever invented; that the company was not good for anything; Ossian Simonds was not worth a dollar if his debts were paid; Horatio Hollister had more ways for his money than to have any in the store; they were owing a large amount below, and the store must fail; it was a rotten concern; they were insolvent and bankrupt; the Union store could not pay its debts, and could not get trusted below; the Union store was a rotten, dishonest and unsafe concern; they were owing a good deal of money in Boston and New York, and a note for five hundred dollars on which his name was, and they trusted everything to their agent; that through the management of their

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agent they must fail up; that the Union Store must close; the banks would not give them credit, and individuals would not trust them." Evidence was also introduced tending to prove the speaking of the words imputing dishonesty to Lincoln, which, under the decision of the court, it is unnecessary to repeat.

The defendant denied the speaking of the words, and gave evidence tending to show that he did not speak them; and also gave evidence tending to show that Gerry Brown and Artemas Wilcox, two of the plaintiffs of record, were not members of the Union, although it was conceded that Brown traded at the same rates as members of the firm, who, it appeared by the rules of the association, were to be, and who were, charged a less price than persons not members. The defendant offered the statement of Brown, to the effect that he never was a member of the firm, drawn up by one of the attorneys of the defendant, and signed and sworn to by Brown, which was objected to, but admitted by the court.

The evidence as to whether Brown and Wilcox were members of the association, is sufficiently stated in the opinion of the court. The plaintiffs, to rebut the defendant's evidence in relation to Wilcox, offered a paper which, it appeared, was signed by the wife of Wilcox, but it did not appear that it was signed by her in his presence, or with his consent or knowledge, though it did appear that, when the paper was first drawn, Wilcox refused to sign it, and said he had done nothing to get into the company and would do nothing to get out of it; afterwards, it was signed by the wife, in the name of her husband, and Wilcox's son said he took the paper, by his mother's direction, to the clerk to obtain an order for the withdrawal of the money, (which had been paid in by her) which order was obtained with the paper; and the same witness stated that he did not know that his father knew of the signing of the paper, and that his father would not assent to its being signed. On this evidence the paper was excluded by the court, and the plaintiffs excepted.

The first and second constitutions, or articles of association, were introduced in evidence, and evidence was given to show that, on the adoption of the second constitution, none of the members signed it, and that the signing was practically dispensed

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with. The material portions of the constitutions are recited in the opinion of the court.

The court charged the jury, as to the slanderous words laid in the declaration and the evidence to sustain them, that the allegations as to Lincoln, and the evidence tending to prove them, ought not to be considered by the jury in assessing damages, as there were no averments in the declaration sufficient to connect him with the plaintiffs, so as to make the words spoken of him become slander of the plaintiffs; that the only words alleged in the declaration which the evidence tended to prove, and which were so connected, by a proper colloquium or averments, with the plaintiffs as to make them actionable, were the following: "they cannot pay their debts;" "they are bankrupt;" "it is a dishonest concern;" and as to these words alleged in the declaration, it was not necessary for the plaintiffs to prove the very form of expression, the identical words laid; it was enough if the plaintiffs proved the substance of the alleged slander, if the words as proved, though not the very ones laid in the declaration, conveyed the same idea, the same and no other meaning; and upon this point they should consider the evidence tending to show that the defendant had said of the plaintiffs, as partners and merchants, "the company is bankrupt and cannot pay their debts; the company is a dishonest and rotten concern; they are unable to pay their debts; they are owing more than they can pay; the store is unable to pay its debts; the company is not good for anything; the store was the rottenest and dishonestest piece of business ever invented; that they were insolvent," and other similar expressions; and if they found that the defendant had in substance spoken of them the slanderous words laid in the declaration, and which the court had already stated were actionable, then this point would be made out for the plaintiffs; but that unless the words so alleged, or the substance of them, were proved by the plaintiffs, they could not recover; that if proved, the jury might then consider the evidence of the other slanderous language as tending to show malice, and so to enhance the damages, but for no other purpose.

The court also charged the jury that they must find *all* the persons, as alleged in the declaration, to have been partners, or the plaintiffs could not recover; and that if either Brown or

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Wilcox was not a partner, the action must fail; that the association entered into, as shown by the constitution and the other testimony, for the purpose of buying and selling goods, was a partnership; that in order to show a partnership between the plaintiffs, to sustain this action, they must show that the plaintiffs and all of them were partners as between themselves, and that they had agreed to become members of the firm, or association, called the "New England Protective Union, No. 230;" that it was not necessary that they should understand all the liabilities they might eventually incur by entering into the contract, nor that they should call their contract by the name of a partnership; but they must agree to become members of the association in order to make their contract a partnership; that if Brown and Wilcox did agree to become members of the N. E. Protective Union, No. 230, and did, in fact, by their agreement and understanding, so become members, then on this point the plaintiffs sustained their action; but that if either of them did not so become a member of the association, then the action must fail; that this was a question of fact for the jury to determine from the evidence, and if the jury were satisfied that Brown and Wilcox respectively understood that they were members, or that they must, as reasonable men, have so understood it from what they respectively said and did, and what was said and done to and with them by the company, in regard to becoming and being members, then the action as to this part of the defence was sustained.

As to damages, the court charged that if the jury found actual malice in the defendant, and that from this malice he uttered the slanders with intent to injure the plaintiffs in their business as merchants in company, then the jury could give exemplary damages.

To the portions of the charge above stated the plaintiffs excepted. The court gave such further instructions as the case required, to which no exceptions were taken.

Verdict for the defendant.

F. Potter and D. E. Nicholson for the plaintiffs.

1. The written admission of Brown should have been rejected,

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for the reason that Brown himself was a competent witness, and because all the reasons that forbid the attorney in a cause from writing a deposition designed for use in such cause, weigh with equal force against admitting the paper in question.

2. The court, instead of excluding altogether the paper signed by Wilcox's wife, should have admitted it with proper instructions to the jury as to the facts it would be necessary for them to find, in order that the paper should be allowed to affect the issue.

3. The words spoken of Lincoln should not have been excluded from the consideration of the jury, as the declaration is not defective in the particular essential to make the words admissible.

4. The court should have fairly recapitulated the testimony on the question of whether, or not, Brown and Wilcox were members of the company, and instructed the jury as a matter of law, in the light of the facts left for them to find, whether the facts, if found, would constitute them members; and not have left it to the jury, as a *question of fact*, whether they were members.

5. The court charged the jury that the only words actionable, which the evidence tended to prove, were the following: "they cannot pay their debts;" "they are bankrupt;" "it is a dishonest concern." The plaintiffs contended that there were other words in the declaration actionable, which were supported by the evidence: as, "they must run out;" "it will be shut up;" "he did not consider the Division safe;" "the store will fail;" "they cannot get trusted in market a dollar;" "O. H. Simonds is not worth a dollar;" which were supported by the evidence. "Division 280 must fail;" "they must eventually come down;" "they must fail up;" "the Union Store must close;" "they cannot get trusted a dollar;" "they could not get trusted below;" "they could not borrow money;" "Ossian Simonds was not worth a dollar if his debts were paid." Any words that have a tendency to injure the business or credit of a tradesman are actionable. Bacon's Ab. Title, "Slander." And it is sufficient to prove some of the words laid, provided those omitted do not alter the sense. Starkie's Ev., Vol. II, p. 848. Chitty's Pl. 405.

6. Brown and Wilcox were members of the association on the facts proved. The court should have charged the jury, that if

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they paid in the eight dollars, enjoyed the privilege of the association and received a certificate of membership, they were members. It is entirely immaterial whether they understood that they were members or not.

H. Allen, for the defendant.

1. The admission of one of several joint plaintiffs is always receivable in evidence; and the rule is not varied by the fact that the admission was drawn up by one of the attorneys of the defendant. *Brown v. Munger*, 16 Vt. 13. *Campbell v. D. wey*, 16 Vt. 538.

2. The paper signed by Wilcox's wife was properly rejected. It was not signed with the assent or knowledge of Wilcox, or by any agent authorized to execute instruments of that character.

3. In order to make the words spoken of Lincoln defamatory of the plaintiffs, and so entitled to be considered by the jury, the declaration should have alleged that the plaintiffs had knowledge of the dishonesty imputed to their agent. Stephen's *nisi prius*, 2562 and 2539, note v.

4. There is no mention in the declaration, except by way of *innuendo*, that Lincoln was agent and clerk of the plaintiffs. There is no legal averment to that effect. Words imputing dishonesty to him are, therefore, no more defamatory of the plaintiffs than words imputing dishonesty to any other person. Stephen's *nisi prius*, 2568, 2570; 1 Chitty's Pl. 407; 1 Aikens, 33; 12 Vt. 51; 13 Vt. 42; 14 Vt. 462.

5. The charge of the court as to what was necessary to constitute Brown and Wilcox partners with the remaining plaintiffs, was correct. Collyer on Part. 2; 10 Vt. 170.

6. The only words in the declaration which the evidence tended to prove, and which were so connected with the plaintiffs, by proper colloquium or averments, as to make them actionable, were the following; "they cannot pay their debts;" "they are bankrupt;" "it is a dishonest concern." As to variance see 1 Chitty's Pl. 405; Stephens *nisi prius*, 2575.

POLAND, J. I. The written admission or affidavit signed and sworn to by Brown, one of the plaintiffs, was correctly admitted as evidence. He was one of the plaintiffs of record, and, for aught

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that appears a party in interest equally with the other plaintiffs.

The proper weight to be given to the paper as evidence of the facts stated in it, was wholly a question for the jury, and if the fact that it was drawn up by the defendants' attorney had any tendency to induce a belief that it was unfairly obtained or was not a fair and truthful statement, all this was proper matter of argument to the jury as to the amount of evidence the paper furnished.

II. The paper offered by the plaintiffs, signed by the wife of Wilcox, one of the plaintiffs, was properly excluded. It was not signed by him, and the evidence was that, when presented to him, he refused to sign it. There was no evidence that he assented to his wife's putting his name to it, or that he knew it even, but there was evidence that he did not assent. It does not appear that he assented to the paper being used in any way, for any purpose. How under this evidence it could be claimed that this paper was admissible as an act or admission by, or authority from, Wilcox, seems to us beyond conjecture. This paper has not been shown us, but from the exceptions seems to have been made by Mrs. Wilcox, to enable her to withdraw the eight dollars she had paid into this Union Store, without the consent and against the direction of her husband.

III. It is claimed that the charge was not correct upon the evidence in relation to whether Brown and Wilcox, two of the plaintiffs, were really members of the division or partnership. The general rule of law laid down by the court, that if they were not shown to be members of the division, the action could not be maintained, is not questioned, but it is claimed that the charge should have been specific, that upon the facts proved, and which were not denied by the defendant, those persons were members of the firm or division.

To determine this it is necessary to see what was required to make one a member, and what was in fact done. The first constitution provided as to membership as follows: "Any person of good moral character who shall subscribe this constitution and pay to the treasurer the sum of eight dollars, may become a member of this division, and be entitled to all its privileges and benefits."

The second constitution provided for admission of members as follows: "Any person, with the consent of a majority of the

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members who shall pay to the directors eight dollars and sign this constitution, shall be a member of this division, and shall receive a certificate of membership signed by the president and secretary, and be entitled to equal privileges and benefits." Each constitution contained a provision allowing members to withdraw at the end of any year by giving previous notice, and each also provided that members should have goods at five per cent. less than they were sold to persons not members. The above provisions are substantially all that is provided as to the manner of becoming members, their privileges while members, and their right of withdrawing from the division.

The evidence as to Brown was, that he never signed either constitution, but he paid eight dollars to Lincoln, the agent of the division, and requested him to present his name at the first meeting as an applicant for admission as a member; that Lincoln presented his name either at a meeting, or to the directors, and was directed to give Brown a certificate of membership, which he did, and that Brown was afterwards allowed to trade as a member. These facts certainly tend very strongly to prove that he became a member of the division. On the other hand, the defendants' evidence tended to prove that when Brown paid the eight dollars to Lincoln, it was understood between them that Brown was not to become a member of the division, but that he paid the eight dollars upon the consideration that he was to be allowed to have goods at members' prices.

If this was the whole effect of the arrangement it clearly would not constitute him a member, even if Lincoln exceeded his authority or violated his instructions in making it.

The plaintiffs' counsel insists that it is wholly a question of law, whether an existing joint arrangement between two or more persons constitutes a partnership, and does not depend upon the intent or even upon the agreement of the parties, and to a certain extent this is true. If two or more persons join their funds in an enterprize in which they are to share in the profit or loss, the law declares it a partnership, even though the parties have expressly agreed that it shall not be so. But here the question was, not what should be the legal effect of his becoming a member, but whether he ever became a member, and entitled to a

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division of profits. This was a question of fact, to be determined by the jury, and like any other case, when it is in dispute whether a contract has been made, the intent and understanding of the parties was a material consideration for the jury. None of the facts proved by the plaintiffs were legally conclusive that Brown became a member of the division. They tended to prove that he did; the defendant's evidence tended to prove that he did not, and it properly belonged to the jury to decide the question whether he became a member or not. Wilcox signed the first constitution, but it was not claimed that this alone constituted him a member, as he refused to pay the eight dollars. Afterwards his wife paid the eight dollars, and he and his family were then permitted to trade at the same prices as members, and the plaintiff's evidence tended to prove that he attended the meetings of the company.

The defendant's evidence tended to prove that the payment of the eight dollars by Mrs. Wilcox, was against the express direction of her husband, and if this was so, it could not have any legal effect upon him; his wife could not make him a member of the company against his will. The evidence of his attending the meetings, and trading at the store at members' prices, was evidence tending undoubtedly to prove a subsequent assent and approbation of this payment but not conclusive. It all terminated in a question of fact for the jury, whether he became a member or not. The county court left it to the jury to find whether these persons were members of the firm, and no objection is now made to any part of the charge as detailed, on this part of the case, but they claim the instructions should have been more specific. It does not appear that any specific instruction was asked which was refused, and exceptions were taken merely to that part of the charge stated. The case stated that the charge, except such as is given, was satisfactory. We are to assume that in reference to the details of the evidence and the proper effect of each part of it, the charge was satisfactory.

IV. The court below correctly laid out of the case all that was alleged in the declaration, or proved on the trial, in reference to the defendant's statements against the character of Lincoln. The action is brought to recover damages for a slander of the plaintiffs' firm, as a mercantile house, for words tending to injure

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their mercantile credit, and character as fair dealers. Whether words imputing dishonesty to their clerk could be actionable in favor of the firm, without charging that it was known or approved by the firm, it is not necessary to decide at this time. The difficulty with the plaintiffs' case in this respect is, that nothing appeared properly upon the declaration but that Lincoln is a mere stranger to them, wholly unconnected with their affairs or business. If he was so connected with them, or their business, that charges of dishonesty against him would injure the credit or character of their firm, this should have been distinctly set forth by a distinct introductory averment. The statement of the words in the declaration relative to Lincoln, is followed by an innuendo (meaning the plaintiffs' agent and clerk,) but this is no averment of the fact. The authorities on the subject of declarations in slander, and the respective offices of introductory averments, or *colloquiums*, and of innuendoes, are all in harmony, but I have found them nowhere stated more concisely and clearly than by ROYCE, J., in *Fitzsimmons v. Cutler*, 1 Aik. 33. "There is a material distinction in a declaration of this sort between an inducement, introduction or colloquium, and an innuendo. The office of the former is to set forth the occasion and circumstances of the publication, and to allege all extrinsic facts which are necessary to be taken in connection with the words spoken, in order to complete the sense; while the latter has no other use than simply to ascertain the application of previous expressions to particular persons or things.

"It means no more than the words *id est, scilicet, or meaning* or *aforesaid*, as explanatory of a subject matter sufficiently expressed before, as such an one, meaning the defendant, or such a subject, meaning the subject in question. But as an innuendo is only used as a word of explanation, it cannot extend the sense of the words spoken by the defendant beyond their own meaning, unless something is previously put upon the record for it to explain. Hence it is universally agreed that if words spoken are not actionable, with a mere explanation of the persons or things intended by them, they cannot be made so by an innuendo, for an innuendo is only a word of explanation, and never of addition or extension."

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V. The only other point upon these exceptions reserved, is in reference to the charge of the court to the proof of the speaking the words laid in the declaration. The court charged the jury that it was not necessary for the plaintiffs to prove the very form of expression, the identical words as laid; it was enough if the plaintiffs proved the substance of the alleged slander, if the words as proved, though not the very ones laid in the declaration, conveyed the same idea, the same, and no other meaning.

The authorities all agree that a declaration in slander to be good must profess to set forth the very words spoken by the defendant; it is not enough to allege generally that the defendant charged the plaintiff with the commission of a crime, as that he had committed *perjury* or *arson*.

This was decided in this State in *Hazelton v. Weare*, 8 Vt. 480. So in a plea of justification in slander the defendant must justify speaking the same words set out in the declaration; this was held in this State in the case of *Skinner v. Grant*, 12 Vt. 456.

From these well established doctrines as to declaring and pleading in these actions, it would seem on principle necessary, when the plaintiff is called upon to support his declaration by proof, that he should prove the words precisely as alleged. This was the ancient rule in the English courts; 2 Selwyn's N. P. 1267, and cases cited in notes.

But from the great difficulty in actions for verbal slander in proving the words precisely as alleged, some relaxation in the rule on this subject has been allowed.

Mr. SELWYN says on the page above quoted that it is now "sufficient to prove the substance of the words." It is clear, however, from what follows that Mr. SELWYN does not mean that it is sufficient to sustain the charge by other language having the same meaning, but that the substance of the *same words* must be proved.

Mr. CHITTY states the rule as follows: "The plaintiff need not prove all the words laid, if they do not constitute one entire charge, and the non-proof would not alter its meaning; though he must prove such of them as will be sufficient to sustain his action, and it will not suffice to prove *equivalent expressions*." In the American notes to SELWYN above cited it is laid down "that though all the words alleged need not be proved, it is necessary

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some of those which are actionable should be proved as laid;" citing *Foster v. Small*, 3 Whart. 138; *Cummings v. Butler*, 3 Blackf. 190; *Wheeler v. Robb*, *ib.* 330; *Whiting v. Smith*, 13 Pick. 364.

In another note on the same page, it is said, "but though the words proved are equivalent to those laid in the declaration, yet if they are not the same in substance, judgment will be arrested," and cites *Olmstead v. Miller*, 1 Wend. 506; *McAlmont v. McClelland*, 14 S. & R. 359.

In *Hazelton v. Weare*, above cited, ROYCE, J., says, "It is a rule laid down in all the books that in an action for slander the words constituting the slanderous charge must be set forth. And to avoid inconvenience from the strictness of this rule, some slight relaxation is permitted in the evidence. This need not correspond in every minute particular with the words as laid, provided the identity of the charge is substantially made out."

In *Smith v. Miles* 15 Vt. 245, REDFIELD, J., says, "The jury must find the speaking of the words as alleged, i. e. so many of the same words as go to constitute the sting of the charge." All these authorities seem to amount to the same thing, though expressed differently somewhat. All agree that it is not necessary to prove all the words laid, unless those not proved vary the sense and meaning of the others which are proved so as to make the charge proved a different one from that alleged. We think the true rule to be gathered from them all is that the substance of the alleged charge must be proved in substantially the same words laid in the declaration. That any mere variation in the form of expression merely would not be material, but that the words alleged cannot be proved by showing that the defendant expressed the same meaning but in different words. The language of the charge would admit of a more liberal and extended application than this, but probably was intended to be substantially as we now hold. If not, however, the plaintiffs cannot complain, as the error was in their favor. We need take no time to examine the particular application of the rule by the county court to all the different statements of the defendant proved. It is sufficient to say that in our judgment it was quite as liberal to the plaintiffs, as the rules of law would justify.

The judgment of the county court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON,
AT THE
FEBRUARY TERM, 1860.

PRESENT:

HON. ISAAC F. REDFIELD, CHIEF JUDGE,
HON. LUKE P. POLAND, } ASSISTANT JUDGES.
HON. ASA O. ALDIS, }
HON. JAMES BARRETT, }

JAMES A. SHEDD & CO. v. THE BANK OF BRATTLEBORO.

Chancery. Partnership. Confession of judgment. Officer. Marshalling assets. Attaching creditors. Promissory note. Consideration.

A court of chancery will not interfere to set aside a judgment or execution merely on the ground of a technical informality, even though such objection is so serious that a court of equity could not relieve the other party from its legal consequences. In cases of such defects equity generally refers both parties to their legal rights and remedies.

The ~~auditors~~ prayed the court to set aside an execution in favor of the defendants against a firm (against whom the orators had a claim and a subsequent

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attachment to that of the defendants) on the ground that the defendants' writ was returnable to an incorrectly designated term of court, and because the orators' execution was taken out by them against all the members of the firm, upon a confession of judgment by only one of them; *Held*, that these causes were insufficient to justify any interference with the execution by a court of equity.

One partner alone cannot legally confess judgment against the firm.

It seems that in the case of a judgment so rendered upon such a confession, the officer, holding the execution issued thereon, will not, as against subsequent attaching creditors of the same property, be justified in paying over to the creditors in the confession the avails of the property attached by him upon the process on which such confession was rendered.

In marshalling assets in equity, it is indispensable that all the parties in interest should be before the court; or at least that the *assets* should be so before this court that the judgment would operate *in rem*. Such is not the case with money deposited in a bank in this State by a citizen of another State, not a party to the bill.

In a case free from fraud there is no such privity among attaching creditors of the same debtor, when one has the first attachment of two distinct and differently located parcels of property, each being sufficient to secure his debt, and the other has an attachment upon only one of such parcels, as will justify a court of equity to so marshal the assets as to compel the first attaching creditor to collect his debt solely out of the property which the other has not attached.

A note given by one in failing circumstances, made payable on demand, and executed solely for the purpose of being immediately put in suit in order to secure the maker's existing obligations to the payee, which have not yet matured, is valid even against subsequent attaching creditors of the property attached in the suit on such note, and whose claims had matured at the time of its execution.

BILL IN CHANCERY. The bill set forth, in substance, that for some months previous to the 1st of September, 1857, John Robertson, Edwin R. Robertson, and J. ~~S~~. C. Cook, were partners in the manufacture of paper, at Hinsdale, New Hampshire, and Bartonsville, Vermont, under the names of Robertson, Cook & Co., and E. R. Robertson & Co., respectively; that on the 25th of September, 1857, such firms still continuing in existence, the defendants held various notes and bills of exchange, made, drawn, indorsed or accepted by John and Edwin R. Robertson, and by Robertson, Cook & Co., none of which had at that time matured; that the members of these firms determined on that day to close

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up their partnership business, for the purpose of defrauding their creditors, among whom were the orators; that on that day they made known to the defendants their desire to put their personal property beyond the control of their creditors, where they, themselves, could have the control thereof; that in pursuance of this purpose it was then agreed between Robertsons & Cook and the defendants, that the former should execute to the latter two promissory notes of twenty-five hundred dollars each, payable on demand, and that the defendants should simultaneously, by bringing a suit on each of such notes, one in New Hampshire and one in Vermont, attach thereon all the personal property of each firm, in each of those States, and should hold the same under such attachments, subject to the control of those firms; that such notes were executed and delivered to the defendants in pursuance of this design, and were received by them as collateral security for their demands against those firms; that suits were immediately instituted thereon by the defendants against such firms, one returnable to the Windham county court, in this State, at the April Term, 1858, and the other returnable to the court of common pleas, in Cheshire county, New Hampshire, at the March Term, 1858; that the writ in the latter suit was immediately placed in the hands of one Priest, a New Hampshire officer, for service, and was served by him, on the same day, by attaching a large amount of personal property, sufficient to satisfy the defendants' claims; that after this attachment in New Hampshire by the defendants, who were the first attaching creditors in both States, other creditors caused the same property to be attached by the same officer; that the attaching creditors afterwards agreed that Priest might sell the property attached, and hold the money to apply upon their several executions when rendered, according to the priority of their respective liens; that Priest accordingly sold the property for two thousand eighty-nine dollars and eighty-three cents, and deposited the money in the defendants' bank; that the defendants in their New Hampshire suit declared on the general counts, and took judgment therein upon one of the twenty-five hundred dollar notes for fourteen hundred and six dollars and four cents damages and eight dollars costs, and left the note in the files of the court, and that execution was issued upon such

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judgment, dated April 2d, 1858, and put into the hands of Priest for collection; that on the 25th of September, 1857, the writ sued out upon the other twenty-five hundred dollar note, and returnable to the Windham county court, in this State, (but which, however, was made returnable on the third Tuesday of April, 1858, when it should have been on the second Tuesday,) was placed in the hands of George Slate, a deputy sheriff, for service, who, on the next day, served it by attaching a large amount of personal property belonging to the debtors, in this State; that the orators subsequently brought a suit in this State against Robertson, Cook & Co., and caused the same personal property to be attached thereon by Slate, and that they recovered a judgment thereon for fourteen hundred and thirty-three dollars and twenty-one cents damages and costs, and took out an execution and placed it in Slate's hands for collection, within thirty days from the time of the rendition of the judgment; that by the consent of the defendants, the orators and other creditors who had attached the personal property in this State, Slate had sold the same for thirteen hundred and seventy-eight dollars and sixty cents, and retained the money to be applied on such judgments as should be rendered, according to the priority of their respective liens; that the defendants, in pursuance of the fraudulent purpose above mentioned, took a confession of judgment on the suit brought by them in this State, on the 12th of April, 1858, from Edwin R. Robertson, before a justice of the peace, for fourteen hundred and seven dollars and costs; that none of the firm were present at such confession except Edwin R. Robertson, and that the other two members had never confessed judgment in that suit; that for the purpose of gaining possession of the avails of the property sold in Vermont, the defendants induced the justice, taking such confession, to issue an execution thereon against all the members of the firm of Robertson, Cook & Co., and that at the time of such confession no note of the debtors, nor any specification of the claim against them, was presented to or left with the justice; that when these suits were brought, the defendants had no claims against the debtors upon which they could then sue, except the twenty-five hundred dollar notes, given for the purpose already mentioned; that the judgment in New Hampshire merged what-

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ever claim of the defendants upon which it was rendered, and, therefore, none existed as a basis for the confession of judgment in Vermont; that the orators had offered to pay the claims of the defendants against Robertson, Cook & Co., and E. R. Robertson & Co., if they would assign the same to the orators, which the defendants had refused to do; that the orators had requested the defendants to take payment of their claims out of the money deposited with them by Priest, and on which they had the first lien, and to refrain from collecting the execution issued upon the confession of judgment in this State, all which the defendants had refused to do. The bill prayed that such execution might be set aside, and that the defendants should be decreed to apply the avails of the property, sold by Priest and deposited with them, in payment of the amount of their claim, and be enjoined from proceeding in any way to collect the execution issued upon the confession of judgment, and that they should account with the orators for whatever collateral security they held for their claim against Robertson, Cook & Co., and for further relief, etc.

The answer of the defendants, and the testimony introduced by them, tended to prove that on the 25th of September, 1857, they held paper on which the firms of Robertson, Cook & Co. and E. R. Robertson & Co. were liable, either as drawers, makers, acceptors or indorsers, to the amount of about eight thousand dollars; that but a small portion of this paper was then due; that these firms became embarrassed, and being desirous to protect the defendants, executed, for the purpose of securing that end, the two twenty-five hundred dollar notes described in the bill, with the intention that the same should be put in suit in Vermont and New Hampshire, and the property attached, and that this intention was carried out as stated in the bill; that on the same day these notes were given, the defendants released the makers from liability as indorsers upon a certain amount of the paper held by them; that it was expressly agreed between the defendants and the makers of the twenty-five hundred dollar notes, at the time they were given, that the defendants would take judgment thereon for no greater sum than should prove to be due on the paper held by them when such judgments should be rendered; that when the judgments were taken, as stated in the bill, all the

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paper held by the defendants, upon which the names of these firms appeared, had been paid, except certain notes and drafts to the amount for which such judgments were taken, being about fourteen hundred dollars.

With the exception of the particulars above recited, and also except that the answer and the defendants' testimony wholly denied the truth of all that part of the bill alleging any intent, communication of an intent, or practices with the intent, on the part either of Robertson, Cook & Co. or of the defendants, to defraud the creditors of the former, the material allegations of the bill were admitted by the defendants.

The testimony on the part of the defendants also tended to show that Cook had not been long connected with the Robertsons in business, and that a portion of the indebtedness to the defendants accrued before he entered the firm; but it also appeared that the new firm assumed all the liabilities and took all the assets of the old firm, composed of the Robertsons alone. Under the decision of the court, the details of this portion of the testimony become unimportant.

Testimony was taken by the orators tending to prove the allegations of their bill, and the cause was heard before **PIERPOINT**, Chancellor, at the June Term, 1859, and the bill was dismissed, from which decree the orators appealed

G. W. Harmon and Edward J. Phelps, for the orators.

D. Kellogg and J. D. Bradley, for the defendants.

REDFIELD, Ch. J. It is obvious that most of the topics discussed at the bar are not even remotely alluded to in the bill. There is nothing here in regard to this having been, in part or whole, the debt of the former firm, composed of John and Edwin R. Robertson, and so the effects of the Robertsons & Cook not liable for it. But from the statement in the bill that Cook had been a partner some months before the 1st of September, 1857, and the fact that the oldest paper held by the defendants was made June 10, 1857, on four months, we infer that it was the debt of the Robertsons & Cook on the 25th of September, 1857, and probably so at the time it was made.

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So, too, in regard to applying the effects of the partnership after Cook's admission, if that point were made in the bill, the proof even does not seem to make a case for equitable interference. For where a partnership is only changed by the admission of a new partner, all the effects and liabilities continuing the same as before the change, there is no ground whatever for equitable interference in favor of the creditors of the new firm. The higher equity rather exists in favor of the creditors of the old firm. But this court have before held that equity will not interfere in such cases, but let all the creditors of both firms share alike in the property, to which both classes of creditors have contributed, and to which both may be presumed to have given credit. This seems both reasonable and just, and, as we judge, strictly equitable; *Shedd v. Wilson*, 27 Vt. 478.

So, too, if any of the paper held by the defendants was really the debt of the former firm, and Cook not then a partner, which seems more than questionable, as all the effects passed into the new firm, it was highly just and proper that the new firm should also assume, with the effects, the burdens of the former partnership. It is certain that such a transaction cannot be characterized as fraudulent in a court of equity, or made the basis of equitable interference in any form.

The same is true of the objection stated in the bill, that the defendants' writ was made returnable at a different time from that fixed by law. This is not even named in argument, upon the ground, we suppose, that it is, at most, a technical defect in the legal proceedings, which does not affect the substantial equities between the defendants and these orators, and of which none but the debtors themselves could take advantage, at any time or in any form, and which they might therefore waive without any just ground of complaint on the part of their other creditors, and which, by not being asserted in the proper time, becomes definitely and perpetually waived and concluded as to the debtors even, and much more as to others, having no legal or equitable interest in the question.

We think the same course of argument must be regarded as a conclusive answer to the objections founded upon the mode in which the defendants obtained judgment against their debtors.

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This is no ground of equitable interference. It is, at most, a formal and technical defect, such as a court of equity will never aid a party in asserting, but will sometimes relieve a party from. More commonly, however, courts of equity leave the parties to the assertion of mere technical rights in courts of law.

The defects in the confession of judgment all depend upon the fact that but one of the debtors came before the justice. This has, no doubt, in practice in this State, been regarded as a fatal defect, so far as those not appearing are concerned. But we are not aware that the question has ever arisen in this court. The terms of the statute are, that the "justice may accept and record a confession of any debt to a creditor, made personally, either with or without antecedent process, as the parties shall agree, and render judgment on such confession." Here is evidently an express requirement that the confession shall be made in person. This form of giving judgment very probably grew out of the English practice of giving a creditor a warrant to confess judgment in the name of the debtor. There the act of the debtor is giving the warrant of attorney. This act is required to be verified, in the English practice, by certain statutory formalities, in order to give it authenticity. And the courts have been very cautious in requiring a strict compliance with all the requisite formalities in giving the creditor a warrant of attorney to confess judgment.

But in our practice, under statutes similar to that in this State, it has generally been held that one joint debtor cannot confess judgment for his creditors. And we are not aware that the case of a copartnership is essentially different in this respect, from other joint debtors. Partners cannot, as such, bind each other by the acknowledgement of a partnership debt even, in the form of a specialty, or a judgment. The implied authority or agency of the parties on behalf of the firm, does not extend to any such act.

The entry of judgment then against the three upon the appearance and confession of one, must be regarded as irregular upon its face, and the execution liable to be set aside by *audita querela* brought by the debtors. The execution being valid upon its face might possibly be a protection to the officer to some extent. But as the rendition of judgment and issuing of execution within

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thirty days thereafter, are required to charge the property in execution, it would seem that the officer must show the judgment in order to justify making the application upon the defendant's debt in the first instance. If so, that question very probably might be raised at law in a suit against the officer. And if so, and the judgment is void, the remedy will be ample there. But if the judgment against all the debtors upon the confession of but one debtor, the others acquiescing, for the joint debt of all, is sufficient in law to enable the defendants to hold the funds realized by the sale of the joint property, there is certainly no ground for the interference of a court of equity for that reason. For such a result is highly equitable in itself. And the informality of the judgment being the result of accident or mistake, although not of the character to justify a court of equity in relieving against its consequences, is nevertheless so much of the character of an accident or mistake, that a court of equity, if it could not relieve against it, surely could do nothing to aid the other party in taking advantage of it. The least he could say in regard to this informality is that a court of equity could lend no aid in regard to it. Certainly not in favor of the party claiming the benefit resulting from the mistake of the other party. We must commend the parties to the assertion of their legal rights of a technical character exclusively in a court of law.

In regard to marshalling the assets in both States, and compelling the defendants to exhaust their securities in New Hampshire, one most fatal objection is that it is impossible to proceed upon either the fund or the parties in New Hampshire. Both are beyond the jurisdiction of the court. And in marshalling assets strictly, it is always regarded as indispensable that all the parties in interest should be before the court, so that the decree shall be final and conclusive upon their rights; or at the very least, that the fund should be so before the court that the judgment might operate *in rem*. But it is evident that in this case neither of these things can be said to exist, as to the property in New Hampshire. For money deposited in a bank in this State by an officer for safe keeping is still virtually in the actual possession of such officer; it is not in the possession of the bank or

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of the courts in Vermont any more than if the officer had loaned it to one of our citizens on mortgage security.

We do not intend to say that in no case could any security, which a creditor might have out of the jurisdiction of the State, be taken in account in determining the right of such creditor to go against other funds which were in the State, and upon which other creditors might have a subsequent lien. It might happen that creditors should have ample security upon which other creditors had no claim, and that the necessary result of letting such creditors hold funds in this State would be to divert them from the creditors here and virtually to put them into the hands of the debtors in New Hampshire, and thus in effect to deprive creditors here of their security, not for the benefit of other creditors having equal equity, but for the ease and advantage of the debtor himself perhaps.

It seems to be supposed that such will be the effect in the present case, but we are not satisfied of any such result from the proof.

It seems to us the case is like that of different creditors having attached different parcels of property in different towns, or counties, and by different officers, and one of the subsequent attaching creditors asks a court of equity to decree the first attaching creditor, who had the first lien on both parcels, to levy his whole debt upon some parcel which is not attached by him, or not in such a state of priority, as to enable him to make it available, without regard to the fact that such a course will crowd out other attaching creditors, whose equities may be just as good as his own, and who might, with equal propriety, ask a decree against him, similar to the one he asks against them. A court of equity surely could not interfere in any such one-sided manner.

A court of equity would never, I apprehend, interfere in regard to the priorities of different attaching creditors, whether of the same, or different parcels of property of the same debtor, unless upon the suggestion and proof that some of the prior attachments were merely colorable and got up, through the connivance of the debtor, for the purpose of diverting the debtor's

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property from his just creditors, and thus putting it under his own control through such simulated attachments. In such cases courts of equity have sometimes reluctantly interfered to prevent irreparable injustice. And a court might interfere where one creditor had a prior lien upon property, which other creditors could not reach, and which if not applied in the mode desired, would come into the control of the debtor himself. But that is not this case. Here the purpose of the orators, in this portion of the case, is to compel the defendants to go against the New Hampshire property first, the effect of which will be to defeat or delay the creditors in New Hampshire for the benefit of the orators, who have a lien upon property here subsequent to the defendants. Suppose the courts in New Hampshire should decree the defendants to pursue his lien here and collect his debt here, so as to leave the New Hampshire property for their creditors, which they might do, with far more propriety than for us to send a Vermont creditor into New Hampshire to collect his debt there, for the benefit of our citizens, who are creditors of the same debtor, and which would exclude the New Hampshire creditors from all participation in the personal property in either State, and compel them to depend upon one security, when at law they had more, and when the orator might pursue the balance of property, real and personal, remaining in New Hampshire.

If such a decree were to be asked, then in order to countervail the injustice of the decree here sought, we do not see how it could be resisted with any show of justice. We could not then, as it seems to us, enforce any such decree as is sought for on this point, without a departure from equitable principles, and equally from international comity, both of which we should be unwilling to do. If a person, having mortgage security here, also attach personal property, we cannot compel him to relinquish his attachment, and rely solely upon his mortgage security. There is no such priority among creditors of a living debtor, as to justify the marshalling of the assets, in this mode. And if we cannot do it when the property is all in this State, no more can we do it when a portion of it is in a neighboring State. We must, in either case, allow the creditor first in diligence, to pursue all his remedies until his debt is realized, and then commend the other creditors

to such redress as their respective priorities will enable them to assert at law, upon the remainder of the debtors property. And the only ground upon which a court of equity can interfere with the disposition of property, so attached, is that of fraud.

Fraud, then, is the only remaining question in the case. And taking the fraud alleged in the bill, as the only thing properly before the court, there does not seem to us any satisfactory evidence to sustain it. The bill makes no specific allegation of fraud, unless it be the execution of the two twenty-five hundred dollar notes, when only about fourteen hundred dollars proved ultimately to be due, and most, or all of that was not due at the time the notes were executed. But it was settled, in *Fletcher v. Edson*, 8 Vt. 294, that a note given to indemnify a surety might well be sued before any debt accrued to the payee upon his suretyship, and judgment recovered for the entire debt before the surety paid it, and that there was nothing fraudulent, or objectionable in such a course. But in the present case judgment was not taken, or claimed, for any more than the actual debt. The case just cited seems to relieve this case from all embarrassment on account of the two twenty-five hundred dollar notes. And this seems to be the substratum of the entire claim of fraud, unless the proof showed that this was done for the purpose of cloaking the property of the debtors, and thus enabling them to enjoy it themselves. And in regard to this the evidence is not satisfactory. There is no evidence that the defendants designed to favor the debtors by this arrangement. The only ground of complaint seems to be that the defendants took their pay out of the Vermont property when they might have done it out of the New Hampshire property, as was once arranged among most of the parties. But this arrangement failed by the non-concurrence of the debtors and some of the New Hampshire creditors and their attorneys. There is no claim in the bill for a specific performance of this contract, under which Priest, the New Hampshire officer, sold the property there. It is only stated in the bill, in giving a historical detail of the transactions. No idea of basing relief upon this contract seems prominent, or indeed observable in the bill itself. And it does not appear to us that this contract was ever intended to change or to constitute the basis of the legal rights

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and relations of the parties. It seems never until now to have been regarded as anything more than a waiver of all exception to the officer's proceeding at once, and without the formality of pursuing the legal steps, to convert the personal property into money. After that the money came in the place of the property, and the rights of the parties remained unchanged in other respects. The money being in the defendants' vaults, to the credit of Priest, did not change the rights of any one. In contemplation of law, it was still in Priest's hands in the form of the original property attached. The change of form was merely to save the expense of keeping, and the hazard of loss or deterioration. No one's rights were changed or affected by the substitution of money for the property.

We are not able, therefore, to perceive any ground for equitable interference in the case. The claim of a technical merger will not apply, there being two collateral notes, and if it did it is merely technical and not a ground of equitable interference, unless the defendants attempt to enforce one of their collateral remedies after having collected their whole debt upon the other; *Paddock v. Palmer*, 19 Vt. 581.

Decree of chancellor affirmed.

JAMES B. MEACHAM v. CHESTER B. DOW.*Promissory Notes. Sale of Office. Illegal Consideration.*

A note, executed in consideration of the payee's agreement to resign public office in favor of the maker, and use his influence to secure the latter's appointment as his successor, is void, except in the hands of a *bona fide* holder.

ASSUMPSIT upon a promissory note signed by the defendant and payable to one Burnham, or bearer. Plea, the general issue and trial by jury at the June Term, 1859,—PIERPONT, J., presiding.

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The testimony introduced by the defendant tended to show that Burnham was still the owner of the note, and that it was prosecuted by the plaintiff solely for his benefit; that the note was given upon the consideration that Burnham, who was a United States mail agent, and was contemplating resigning that office, agreed with the defendant to resign in the latter's favor, and to use his influence, with the Department at Washington, for the defendant's appointment in his place; and that it was further agreed in writing, at the same time between them, that if the defendant failed to get the appointment the note should be void.

The plaintiff's evidence tended to show that Burnham, as the consideration of the note, agreed to resign his office as mail agent, and to recommend the defendant as successor, and to use his influence to secure his appointment, and that he did so.

It was conceded that the defendant did not obtain the appointment.

The court instructed the jury that, if, upon the foregoing testimony, they found that Burnham was still the owner of the note, the action could not be maintained, to which the plaintiff excepted.

— — — for the plaintiff.

Hall & Hall, for the defendant.

POLAND, J. If the plaintiff had shown himself the owner and *bona fide* holder of the note in suit, the defendant could not have defeated the action by showing a want of consideration, or that the consideration was illegal.

But the jury having found that the suit was prosecuted in the name of the plaintiff, for the benefit of Burnham, the payee, any defence that could be made to an action in his name, would be equally available in this.

By the contract of the parties, when the note was given, the note was to be void unless the defendant succeeded in obtaining the office of mail agent, and this was evidenced by a writing executed simultaneously with the note.

If the subject matter and consideration of the note had been

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perfectly legal, this alone was a sufficient defence, as the defendant never obtained the office.

But the consideration of the note was really for the sale of the office Burnham held, which made the note illegal and void, as between the original parties.

The principles settled in *Ferris v. Adams*, 23 Vt. 136, are decisive of the case on this point. It was then held that a note executed by a deputy sheriff to the sheriff, as the price of his appointment as deputy, was illegal, and that no recovery could be had upon it. The law upon the subject is very fully examined and stated in the opinion of the chief justice in that case, and we need only now to refer to that opinion.

The subject of the validity of contracts for the influence and services of one in promoting the election of another to an office, was before this court, and was fully examined and decided on the present circuit in Chittenden County.*

In that case the defendant set up as a defence to a book account, due from him to the plaintiff, that the plaintiff agreed that if the defendant would use his influence and efforts to procure the election of the plaintiff, as a representative to the State Legislature, and vote for him himself, the same should be in full satisfaction and discharge of the account in suit in case he should be elected. The defendant proved a full and successful performance of the contract on his part, but it was held by the court that this contract was illegal and void, and formed no defence to the action.

That case would seem to cover this fully.

The case of *Thetford v. Hubbard*, 22 Vt. 440, where it was held that a note given by a constable to the town upon bidding off the office in town meeting, was legal and could be collected, goes entirely upon the special provisions of the statute on that subject, which in terms authorize towns to contract with some person to fill that office. The court in that case seems to treat such a note as illegal upon general principles.

The directions to the jury were clearly right and the judgment is affirmed.

* See *Nichols v. Mudgett*, ante p. 546.

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Water Course. Servitudes. Deed.

S. originally owned a mill, and an artificial, but ancient, mill-pond, with the surrounding land. He subsequently granted a parcel of such surrounding land, not however bounded on the pond, to the plaintiff's grantor by warrantee deed, with no expressed reservation therein of any right to flow the same, and afterwards conveyed his mill and water privilege to the defendants' grantors. *Held*, that by his deed to the plaintiff's grantor, S. did not part with the right to flow such land, as he had formerly done; and that the subsequent exercise of such right by himself, and his grantees of the mill, was not a breach of his covenant against incumbrances; and independently of the plaintiff's rights derived from adverse use, was not the ground of an action in his favor.

If one, by raising the height of water upon his own land, cause subterranean streams to set back and stand upon the land of another, the latter has no ground of action therefor.

CASE for obstructing a stream, and thereby causing water to flow upon the garden and into the cellar of the plaintiff. Plea, not guilty, and trial by jury at the December Term, 1857,—ALDIS, J., presiding.

Samuel Safford was originally the owner of the defendants' water privilege, of the lands covered by and surrounding their mill-pond, and of the plaintiff's land described in his declaration. On the east side of the pond was a narrow strip of low land; next east of this strip was a road running nearly parallel with the pond, and on the east side of the road was the plaintiff's land, no part of which was bounded upon the pond.

The title of the plaintiff to his garden was derived, through several *mesne* conveyances, by deed from Safford to one Park, dated August 11, 1817, and to his house lot by deed from Safford to the plaintiff, dated May 3, 1827. These deeds merely described the land in question by metes and bounds, professed to convey them "with the appurtenances" to the grantees, their heirs and assignees, and contained the usual covenant against incumbrances. The pond was caused by a dam and not by the natural flow and course of the stream. A dam, with a grist mill operated by the water raised thereby, had stood upon this mill privilege longer than the recollection of any person living at the time of trial, and the dam then in existence was built by Safford

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in 1814, repaired by Abel & Savage in 1828, and was purchased with the water privilege by the defendants in 1853, in which year it was again repaired by them.

The plaintiff offered testimony tending to show that the dam was raised in the middle of the stream by the defendants in 1853 about two feet higher than it formerly had been, and about a foot higher at the ends of the dam—that his garden and house lot and cellar, prior to such repairs upon the dam, had never been flowed except upon a very few occasions when there had been extraordinary freshets; and that since such repairs, his garden had been flowed through the spring and till the middle of June, so that a large part of it was incapable of cultivation, and that the water had stood in his cellar for several months in the year, during high water.

The defendants offered testimony tending to show that between 1822 and 1828, the water in freshets, and occasionally in high water, had been flowed by means of the dam, back and over the land now the garden of the plaintiff; that the water in the pond had been as high, and had flowed as far back at and since the repairs of Abel & Savage in 1828, as since the dam was repaired by the defendants in 1853; that in 1853 they did not raise the dam any higher than it was raised by Abel & Savage in 1828; that the dam of Abel & Savage in 1828 was repaired so as to be originally nearly level, and so that the water flowed over its entire length, but that the center of the dam had gradually sunk in the middle, and the dam had become leaky so that the water in the pond did not for some years previous to 1853 rise so high as formerly; that the ends of the old original dam of 1814 were of the same height as the dam of Abel & Savage, and the dam of the defendants in 1853, and that the injury of which the plaintiff complained, was caused by water from underground streams coming not from the pond, but from an opposite direction, and flowing into the pond.

The defendants requested the court to charge the jury that Abel & Savage under their deed from Safford had a right to repair the dam and raise the center to the same height of the ends of the dam, provided the old dam was built originally level upon the top, and that although since that time the dam had con-

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tinued to settle in the center, and become so out of repair that, ordinarily, the water in the pond had not flowed back upon the plaintiff's land as much for fifteen years before the repairs in 1853 as when the dam was originally built, yet the defendants' right to raise the water to the same height as it was raised by the original dam when level, was not lost, and that the defendants were not liable unless they had raised the dam above its original level height; also, that if the water was higher in consequence simply of leveling and making the dam more tight, although the plaintiff might have been injured thereby, he could not recover provided the water was no higher than it had been accustomed to be raised before and at the dates of the deeds from Safford to Park, and to the plaintiff.

The defendants also requested the court to charge the jury, that if the water in the cellar and upon the garden of the plaintiff came up from subterranean streams, although the water in the pond so obstructed their progress as to cause the water to rise up, the defendants were not liable.

The court declined to charge as requested, but did charge the jury—that as Safford in 1817 and in 1827 owned the lands adjoining the pond, including the lands of the plaintiff, and then conveyed by deed, with a covenant against incumbrances, describing the land by metes and bounds, and not bounding it by the margin of the pond, and without reserving any right to flow the land so conveyed, he then by operation of his deeds parted with all his right to flow the lands so conveyed, and therefore that the right of the defendants to flow the lands so conveyed, if any existed, must have been acquired by an adverse use of the land by flowing it for fifteen years since the dates of the deeds respectively, viz: as to the garden by fifteen years adverse use since August 11th, 1817, and as to the house-lot by fifteen years use since May 3d, 1827; and that if the defendants, and those under whom they claim had not for these periods respectively, raised the water in the pond to as great a height and caused it to flow back to as great an extent upon the garden and the house-lot respectively, as it had since the defendants repaired the dam in 1853, then the defendants were liable.

The court further charged the jury that if the injury of which

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the plaintiff complained was caused by the water from underground streams gushing out upon, or percolating through the plaintiff's land, without being obstructed by the water of the pond having been raised higher than the defendants had a right to raise it, then the plaintiff could not recover; but that if the defendants had raised their pond since 1853 higher than they had the right to do by previous uses, and thereby had obstructed the water in subterranean streams from passing off as formerly, and had caused it to gush out upon, or percolate through, and stand upon the plaintiff's land and in his cellar to his injury, then the defendants were liable.

To the refusal of the court to charge as requested, and to the charge as given, in the particulars above detailed, the defendants excepted.

Daniel Roberts and *Harmon Canfield*, for the defendants.

I. Safford, being the owner of the whole heritage, could, by virtue of his general right of property, impose upon or attach any quality to its several parts that he pleased; *Gale & Whately on Easements*, 39.

II. The quality so attached to that portion conveyed by him to Park and the plaintiff is appurtenant to the part retained, and is *impliedly reserved* in his conveyances as part of his own estate in the *dominant tenement*, and not extinguished by a severance of the heritage. So the deeds should be construed; *Gale & Whately on Easements*, 42, 44, 61, 254, 255, 428; *Cary v. Daniels*, 8 Met. 466.

1. Because without that quality the beneficial enjoyment of the part retained would be in a measure, if not wholly, lost. Hence it was necessary; *Angell & Ames on Watercourses*, 204.

2. It was palpable and manifest to the vendees at the time of the conveyances.

3. It was an "ancient" burthen, "the memory of man runneth not to the contrary," and from its character, apparently *continuous*. Hence it was really the same to the vendees as though the stream had so flowed *ex jure naturæ*.

III. If the injury to the plaintiff was caused by the water of underground streams, although obstructed by the plaintiff's raising water in the pond, the plaintiff cannot recover.

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There is no allegation in the declaration that the injury was so caused ; and even if there were, it would be *damnum absque injuria*, and no right to recover would exist ; *Chatfield v. Wilson*, 28 Vt. 649.

Hall & Hall and *A. P. Lyman*, for the plaintiff.

1. Did Safford, at the time of his deeds to Park and the plaintiff, retain the right to flow the lands conveyed ?

This right to flow the lands of another is an easement, and it is also an incumbrance ; *Bouvier Law Dic. Tit. Easement and Incumbrance ; Butler v. Gale*, 27 Vt. 739.

If this precise right to flow existed in a third person, would not a quitclaim deed of the land convey it ?

If Safford could retain this right to flow, he could with equal reason retain the right to the flume and dam, had they stood upon the premises, the water being taken to the mill by a trunk or trough.

It is the common understanding that an ordinary deed passes all the interest of the grantor in the lands conveyed, unburthened by any right of his ; *Johnson v. Jordan*, 2 Met. 234.

The covenant against incumbrances estops Safford from claiming any incumbrance on the land conveyed.

2. The case shows that this flowage, of which we complain, was not an *apparent* and *continuous* flowage. Ordinarily the water does not flow upon the surface on the land conveyed to Park and the plaintiff, and therefore does not come within the rule claimed by the plaintiff.

3. The court was correct in its charge relative to the effect of the dam upon underground streams.

The defendants below relied upon *Chatfield v. Wilson*, 28 Vt. 49, which case determines a novel question upon the law of water courses.

We are unable to perceive its application here. That case decides that each land owner may dig as he pleases on his own land, though by so doing he drains his neighbor's spring by subterranean streams or by filtration or percolation.

Whether a man may, by raising an artificial pond of water, so obstruct the natural flow of these streams as to cause them to

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gush out upon his neighbor's land, is another question. Whether by thus raising water, although confining its surface to his own land, he may cause it to percolate or filtrate the adjoining soil, and soak his neighbor out of house and home, is another and indeed a *novel* question; *Cooper v. Barber*, 3 Taunt. 99.

BARRETT, J. This is an action on the case to recover damages occasioned by the setting back and flow of the water upon the plaintiff's premises, on account of the wrongful obstruction thereof by the mill dam of the defendants.,

The case discloses that Samuel Safford originally owned a water privilege, on which were a dam, mill pond and mills in operation from time immemorial, and also owned the lands surrounding and bordering upon said pond, of which lands the garden and house lot of the plaintiff were, for a long time, parcel; that a public highway has for a long period existed along upon the eastern side of said pond, a little distance from it; that the plaintiff's premises lie upon and east of said road, and in no part bounded by said pond; that the plaintiff, through several *mesne* conveyances, derived title to his garden by and from said Safford, dated August 11, 1817, and to his house lot by deed direct from said Safford to himself, dated May 3d, 1827. The dam in question (replacing a former one) was built in 1814, and was repaired in 1828, and the mills and privilege were purchased by the defendants in 1853, who in the same year repaired said dam. The plaintiff's evidence seems to have been directed to the point that, by said repairs, the dam was raised above its former elevation, and that thereby the alleged damage to the plaintiff had been caused. This seems to have been the principal subject of controversy upon the evidence. The county court, in the charge to the jury, assumed, upon the construction and effect of said deeds of Safford, that, as to the plaintiff, Safford by said deeds parted with his right to affect the land conveyed by them, by keeping up any dam at all, and if such right thereafter existed, it was in virtue of a *user* of more than fifteen years. Under such a construction of said deeds, it became unimportant how high the dam had been at any time prior to the commencement of such *user*, or how high it was, and how the premises now owned by the plain-

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tiff were affected by it up to and at the time Safford executed his deeds of said garden and house lot.

The defendants claim rights in reference to the condition and height of the dam, and the consequent flow of the water, that might be seriously prejudiced and restricted by such a construction and operation as were given to said deeds by the county court.

Our first business is to consider the exception taken upon this branch of the charge.

— While Safford owned the mill privilege and the surrounding lands, including, as parcel thereof, what the plaintiff now owns, it was his right to do with said property whatever he pleased. In the exercise of that right he created and continued for a long period the mill pond, by means of a dam of such height as served his purposes in operating a mill in the usual course of that kind of business. "When the land burdened and the land benefitted belong to the same owner, he may change the qualities of its several parts at his will, and his express volition evidenced by his acts must be as effectual to impress a new quality upon his inheritance as the implied consent arising from his long continued acquiescence;" Gale & Wh. on Easements, 39.

— While Safford was thus the owner, of course the idea of an *easement* could not attach to such a treatment and use of the stream of water, relatively to the adjacent land. That land, with the stream and the use of it as a mill privilege, constituted an entire estate. Such dam and the use of it were parcel of such estate, and not an *easement*, or in the nature of an easement, nor an incumbrance, or of the nature of an *incumbrance*. The use of the mill privilege, in the manner shown by the evidence, and the effect of it, impressed a condition upon the adjacent soil that might affect its suitability and value for various purposes, might render it less suitable for agricultural or building purposes than it would have been if the stream had not been obstructed by the dam.

Such being the condition of the estate of Safford, produced by the dam existing at a certain height, and causing its natural effect upon the water of the stream at its various grades of height, in causing it to set and flow back upon the adjacent land, Safford

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conveyed that part of the land which the plaintiff now owns, covenanting against incumbrances in common form, and making no express reservation in reference to the mill privilege. What did he part with by such conveyance? the land as described in its condition as produced and affected by the existing dam, or the land and also all right to affect it by interrupting or impeding the natural flow of the stream by the continuance of the dam?

The deeds, in terms, purport to convey only certain parcels of land specifically described, in no part abutting upon the stream. If they are to be held to have divested Safford of his right to affect said land by the continuance of his dam, such result is not directly produced by the primary force of the terms of the granting part of the deeds. It would seem to be the consequential result of the covenant against incumbrances. Such covenant has relation to rights existing in, or in relation to, the property conveyed, appertaining to parties other than the grantor, and which may be claimed and exercised, and enforced upon and against said property, as against such grantor and his assigns.

Now it is obvious, that, in this sense, no such incumbrance existed upon the property now owned by the plaintiff, while the title to it was in Safford. Of course, then, at the moment of passing the title and making the covenant by the delivery of the deeds, the property was free from incumbrance, and so there could not have been a breach at that time, in virtue of the state of the title to, or of rights then existing in, or in respect to, said property. Is it matter of legal intendment that the grantor should, by force of such covenant, be estopped from exercising any right which, if it had existed in, and been exercised by, a third person, prior to said conveyance by Safford, would have constituted an incumbrance? So to hold would seem to be giving to such a covenant a scope and effect beyond what has been regarded as its ordinary and legal limits, and no precedent or authority has been cited to justify us in so holding.

It would have presented a novel case if the defendant, immediately after the conveyance to him by Safford, had brought an action against him for the breach of his covenant against incumbrances, and sought to maintain it on the ground of the existence

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of said dam and pond under a claim of right by Safford to have and continue such dam and pond, as they were, up to and at the moment of delivering his deed. And if Safford had continued his dam and pond for any time after such conveyance under such claim of right, he would have been estopped to deny the existence of the right when averred against him as constituting an incumbrance. The only question in such action would have been, whether it was an incumbrance or not, within the scope and operation of the covenant.

In view of the infrequency of modern cases in which the subject of this branch of the charge is involved, it seems proper to consider somewhat more in detail, and in reference to both principle and authority, the true character, construction and effect of Safford's deeds, as bearing on the view taken by the county court.

- In Gale & Whateley on Easements, p. 40, it is said, "it is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property; but he obtains the same object by the exercise of another right, the general right of property; but he has not the less permanently altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land burthened or benefitted, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it. * * * *

- There is no reason why a purchaser should not exercise the same degree of caution in ascertaining what easements his projected purchase is liable to in favor of his vendor as well as in favor of other adjoining owners."

- The learned authors show, from a most thorough examination and analysis of the cases, that this view has been recognized and acted upon by the courts from a very early period in the record of judicial decisions in England, and also show that the law of the *Civil Code of France* accords therewith. They also show that in this class of cases, while the law will make all necessary implications to prevent the grantor from derogating from his own

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grant, it will reciprocally and equally make like implications to prevent the grantor from being shorn of his just rights in reference to the property which he retains.

The law of the *Civil Code* is, "if the proprietor of two heritages, between which there exists an apparent sign of servitude, disposes of one of the heritages without any stipulation being contained in the contract respecting the servitude, it continues to exist, actively or passively, in favor of the heritage alienated or upon it," which is tantamount to saying that such servitude continues to exist in favor of the heritage not alienated upon that which is alienated, as well as the reverse. And this is equally so where the grantor of a portion of an entire estate has made that portion subject to the convenience of another, by some express act done during the union of the different portions of such estate.

It is laid down as an unquestioned proposition, that, "upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements;" and the doctrine is equally well established that the law will imply a reservation of like easements in favor of the part of the heritage retained by such grantor. On this subject see Gale & Whateley on Easements, ch. 5, and cases cited.

The application of these doctrines to the present case is obvious upon recurring, by way of recapitulation, to the leading facts, viz: that Safford had long owned and kept up the dam and mill, during which time he was also the owner of the lands surrounding and bordering upon said mill pond and mill, including the parcel which the plaintiff now owns and occupies as a house lot and garden. He had thus subjected those bordering and adjacent lands to the use and convenience of the mill privilege and mills; and being thus subjected, he conveyed the parcel of them now owned by the plaintiff. This condition of the estate was obvious, and had been continuous, and was of a character showing that it was designed to continue thereafter, as it has in fact done. This, then, was a palpable and impressed condition, made upon the property by the voluntary act of the owner; and we

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think that, without any stipulation in the deed upon the subject, the true view of the law is, that the grantee took the land which he purchased in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill.

As we understand the case of *Carey v. Daniels*, 8 Met. 466, in an elaborate opinion delivered by SHAW, Ch. J., the law of the subject was held to be as we have now set it forth, and we regard the case itself to be a direct authority for our present application of the law. Without stating in detail the various conveyances by which the parties to that case derived their respective titles, it will be sufficient, for the purpose of showing the principle and its application, to say that the plaintiff's grantor owned a mill with its privileges and appurtenances, and while so owning it he built another dam a little below, and erected a mill upon it, and for a period continued to use both mills. In times of high water the lower dam caused the water to set back upon the wheels of the upper mill and impede their operation, in which event it was the custom for the hands of the upper mill to open a waste gate in the lower dam or mill and let off the excess of water. In this situation of the property the upper mill property was sold and conveyed with all privileges and appurtenances, and with covenants against incumbrances created by the grantor, but without any reservation as to the lower dam and mill, which the plaintiff's grantor retained, but subsequently sold and conveyed to the defendant. In high water the plaintiff experienced the inconvenience of the back water caused by the lower dam, and claimed that by virtue of the conveyance to him, he was entitled to hold his mill free from the injurious effects of the lower dam, and, at any rate, that he had the right to open the waste gate of the lower dam, as had been the custom when the entire property was owned by the same proprietor, both of which claims were denied, and therefore said suit was instituted. X It was held that no implication *from necessity* arose against the defendant's right to continue the lower dam, and that there was nothing to extend the operation of the deed under which the plaintiff held, beyond the plain import of its terms, which was to carry the upper water power, mills and land, as they were then modified and appropriated by

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the defendant's dam below ; and as to the argument drawn from the covenant of warranty by the grantors, it was held that the right to use the water below the granted premises, as modified by the appropriation previously made for the lower mill, was not, in legal contemplation, an incumbrance, but rather in the nature of parcel of such lower estate ; and that the maintaining of the lower dam, to the height to which the water had been appropriated for its use, was not an incumbrance upon the estate granted, and it was still further held that the plaintiff had not the right to open the waste gate of the lower dam to prevent back water. X

In accordance with the views thus expressed, we are led to regard the charge to have been erroneous as to the construction and effect of the deeds of Safford through which the plaintiff acquired his title. We think they should be held to have conveyed the parcels which the plaintiff now owns in the condition in which they were at the time of the respective conveyances by Safford, as affected by the dam at the height it then was, and that the right to maintain and continue said dam at such height was not impaired or affected by those deeds, either by the terms of the granting part or by the covenants against incumbrances.

This result upon the first ground of exception, leads us to the disposition of the other exception taken to the charge.

If the alleged injury to the plaintiff's premises was produced by keeping the dam at the height it was, at the time of the conveyances by Safford, it can make no difference whether the water was caused to set back over the surface, or prevented the underground streams and currents from percolating through the soil off from the plaintiff's premises. In either case there would be no right of recovery. But the court charged the jury "that if the defendants had raised their pond since 1853, higher than they had a right to do by the previous uses, and thereby had obstructed the water in subterranean streams from passing off as formerly, and had caused it to gush out upon, or percolate through, and stand upon the plaintiff's land and in his cellar to his injury, then the defendants were liable."

This charge, in connection with the request of the defendants, involves a consideration of the distinction to be taken between

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water flowing upon the surface and that which percolates in subterranean streams and veins.

So far as flowing surface water was concerned, the plaintiff could not call in question the right of the defendants to keep their dam of any height they chose, provided it did not cause the water to flow upon or soak into his land. He was not bounded upon the stream, and so was not a *riparian* owner. He could not question the defendants' right to overflow the whole surface up to his line, and in this respect it could be no element in his case whether the defendants' pond had been raised higher since 1853 than it had been by previous uses. It could do him no injury, unless it should cause the water to come upon or soak into his land.

The question then arises whether, in case the defendants, within and since the year 1853, have kept their dam higher than it was at the time of the conveyances by Safford, and thereby, by causing a greater height of water in their pond, has impeded the flow of the underground currents through and off from the plaintiff's premises, for this cause alone they are liable to the plaintiff for any injury he may have sustained thereby. This question excludes the idea that, as against the plaintiff, the defendants have transcended their right in respect to the surface water, or infringed any right of the plaintiff in regard to it. For the purposes of this question, the case stands much the same as if the defendants, upon the western margin of the road adjacent to the plaintiff's premises, but upon their own land, had sunk and constructed an impervious wall, and thereby, in the language of the charge, "obstructed the water in subterranean streams from passing off as formerly, and had caused it to gush out upon, and percolate through, and stand upon, the plaintiff's land and in his cellar, to his injury." Can it make any difference how this effect upon the underground streams is produced, whether by a bank of stones upon the defendants' land or a bank of water? Have not the defendants as good a right to pile up the one as the other? It would seem difficult to assign a reason why not.

(In *Chatfield v. Wilson*, 28 Vt. 49, it was held that the law of running surface streams is not applicable to percolating under-

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ground streams, and that, as to percolating water, there are no correlative rights between adjoining owners of the soil touching its use, and it was decided the defendant was not liable for cutting off a supply to the plaintiff's tub by digging on his own territory, even though he did it wantonly, and for the purpose of injuring the plaintiff. The only criticism that we have heard upon that decision was in respect to excluding the wanton and improper motive as an element in the ground of the defendant's liability. In the present case there is no imputation of such a motive. Treating that case as a sound exposition and application of the law, must it not be decisive of the question now in hand? It will be noted that in the present case the complaint is not that the water from the pond percolated or soaked into the land and cellar of the plaintiff, but that it obstructed the flow of underground streams from the plaintiff's land, and it was to this specific fact and feature of the case that this part of the charge was directed.

No reason occurs to us why a party should be liable for the result of acts upon his own land which impede the flowing of underground currents from the land of an adjoining owner, thus producing injury, when it is conceded that he would not be liable for acts that would produce injury by preventing the flow of such currents into the territory of such adjoining owner: why it is less unlawful for my neighbor to drain my well by digging one near mine, on his own soil, than to flood my cellar by the obstruction of a wall or other impediment that prevents the flow of water underground from my premises.

Our late very learned and able associate, Judge BENNETT, in the course of the elaborate opinion in *Chatfield v. Wilson*, says, "the laws of the existence of water underground and of its progress while there, are not uniform, and cannot be known with any degree of certainty, nor can its progress be regulated. It sometimes rises to a great height, and sometimes moves in collateral directions, by some secret influences beyond our comprehension. The secret, changeable and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface

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streams. * * * We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, etc."

The case of *Greenleaf v. Francis* is cited by Judge BENNETT, which (as he says) held that "no action would lie against a man who dug a well on his own land, although he thereby took the water from his neighbor's well, in the absence of all right acquired by grant or adverse user." The case is really put on the ground that "every one has the liberty of doing on his own ground whatever he pleases, even though he occasion some damage to his neighbor."

Being unable to see why the principle and the reasoning in the decision of *Chatfield v. Wilson* are not applicable to the part of the charge we are considering, we are forced to regard that part of the charge as erroneous.

These being the only points that were discussed in the argument by the defendants' counsel, we refrain from any consideration of other points that might have been raised upon the requests of the defendants, and the refusal of the court to charge as requested.

The judgment is reversed, and the cause remanded to the county court.

UEL M. ROBINSON, *Appellee v. THE EXECUTORS OF DAVID ROBINSON, Appellants.*

Probate court. Appeal. Statute.

The appellants, desiring to appeal from the decision and report of the commissioners upon claims against a deceased person's estate, prayed the probate court to be allowed an appeal from the order and decree of the court ordering such report to be allowed and recorded. At the same time they filed in the probate court their objections to the claim allowed by the commissioners. *Held*, that the appeal was regular.

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In construing the statute (sec. 20, chap. LII., p. 353, Comp. Stat.,) which provides that an appeal from the report of commissioners upon claims against an estate, may be taken within twenty days after the return of the report to the probate court, the day when the report is returned is to be excluded.

If, on the last day allowed by statute for filing an appeal, after the usual business hours are over, and the office at which the appeal is required to be filed is closed, a party leaves his appeal in the actual possession of the proper officer to be filed, so that such officer has actual knowledge that it is so left and can then file it, and the officer, on the following morning, lodges it in the proper office, and enters it as filed on the day he actually received it such appeal is regular and within time.

Aliter, when it is merely left at the officer's residence, and it does not appear that it actually came into his possession on the day prescribed by the statute for taking the appeal.

An appeal from probate under such circumstances, is equally regular whether it be delivered to the register or judge of probate.

APPEAL from probate. The facts in the case are sufficiently stated in the opinion of the court. The appellee moved in the county court that the appeal be dismissed, and the court at the December Term, 1859,—KELLOGG, J., presiding,—dismissed the appeal, to which the appellants excepted.

— — — — —, for the appellants.

— — — — —, for the appellee.

ALDIS, J. The first question in this case is as to the regularity and validity of the appeal of the defendants from the proceedings in the probate court. On the 3d day of December, 1859, the commissioners upon the estate of David Robinson returned to the probate court their report allowing and disallowing claims against the estate, and on the same day the probate court made a decree accepting the report and ordering it to be recorded. The defendants prayed to be allowed an appeal "from the order and decree of the probate court." It is objected that this was not a sufficient appeal "from the decision and report of the commissioners" as provided in chap. 52. sec. 20 of the Comp. Statutes; and that it should therefore be quashed.

In *Hodges, Executor v. Thacher et al.*, 23 Vt. 455, the court held that the probate court have a discretion as to accepting or rejecting a report of commissioners that is returned to the court,

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as well for matters that do not appear as for those apparent on the face of the report ; and may re-commit the report to the commissioners if necessary, and that the decision of the commissioners does not become an adjudication in contemplation of law, until returned and accepted by the probate court. It is the decree of the probate court accepting the report and ordering it to be recorded that makes it a final decision—a judgment and record. In this view of the effect of the decree, we think the prayer for an appeal is sufficient if it is expressed as praying for an appeal either from the decree of the court accepting the report, or from the decision and report of the commissioners. In these proceedings in the probate court there is no nicety of form. If the substantial object of the appeal appears, it is enough ; and as the statute requires that the appellant shall, at the time of filing his application for the appeal, also file his objections to the claim in writing, it is obvious that the appellee is expected to refer to the objections as showing the reasons and grounds of the appeal. The objections filed in this case show fully the grounds upon which the appellant claims his appeal, and that the appeal is from the decision of the commissioners. To reject the appeal upon the ground that standing alone it is indefinite, when in compliance with the statute a contemporaneous and definite statement of objections has been filed for the very purpose of giving notice of the reasons for the appeal, would be a most senseless and punctilious adherence to nicety in matters of form. The appeal and the objections are required by the statute to be filed together, and when so filed they should be construed together. This objection to the appeal we deem untenable.

II. The report of the commissioners was returned and accepted by the probate court on the 3d of December, and the appeal was left at the residence of the judge of probate on the evening of the 23d of December. The statute provides that "the appeal in writing shall be filed in the register's office at the time of returning the commissioners' report, or within twenty days after such return."

The appellee claims that the day of the return, (December 3d) shall be included in the twenty days ; if so, then the twenty days would expire on the 22d of December.

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The general expression, that when computation is to be made from an act done, the day on which the act is done is to be included, and may be found very frequently in the books.

Thus no suit shall be brought "till one calendar month next after notice." Notice was given on the 28th of April, suit brought 28th of May. It was held to be well brought, the day of notice (April 28th) being included in the calendar month; *Castle v. Burditt*, 7 Vt. 623.

So when a statute takes effect from its passage, the day on which it is passed is included; *Arnold v. The United States*, 9 Cranch 104.

So where a prisoner is sentenced to the State's prison, the day of his sentence is included in his term; 5 Pick. 420. So where letters patent are issued, the day of their date is included in the term; *Russell v. Ledsam*, 14 Mees. and Wels. 581. Very many other cases of a similar kind may be cited.

On the other hand, numerous cases may be found in the books where the day on which the act is done is excluded. In *Lester v. Garland*, 15 Ves. 248, Sir WILLIAM GRANT, Master of the Rolls, after an examination of most of the cases which had at that time been decided in England, says, "It is not necessary to lay down any general rule; whichever way it should be laid down, cases would occur the reason of which would require exceptions to be made;" and again, "on technical reasoning it would be more easy to maintain that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included." The more recent decisions in England tend to exclude the day. Thus Baron PARKE, in 14 Mees. & Wels. 582, says: "The usual course in recent times has been to construe the day exclusively whenever anything was to be done in a certain day after a given event or date," and refers to the cases of *Webb v. Fairmance*, 3 M. & W. 473, and *Young v. Higgan*, 6 M. & W. 49, where the cases showing the modern rule are collected.

So in the United States the recent decisions all tend in the same direction. In *ex parte Dean*, 2 Cow. 605, where the statute provided that the party appealing from a justice's judgment shall at the time of rendering judgment or within four days there-

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after, file a bond, etc., and the judgment was rendered on September 12, and bond filed September 16, it was held good. So in *Sims v. Hampton*, 1 Sergt. & Rawle 411, where "an appeal may be taken within twenty days after the entry of the award on the docket," the day of the entry was excluded. So in *Browne v. Browne*, 3 Sergt. & Rawle, 496, where "an appeal might be taken within twenty days after judgment being given," the day on which judgment was given was excluded from the twenty days. These cases seem to be directly in point for this case, as the words of the statute indicate more strongly than in this case that the time is to be computed from an act or event, rather than from a date.

To the same result are 4 Greenlf. 298; 7 Greenlf. 31; 9 N. H. 304.

In this State there have been no decisions upon this very point. But in the service of process, in the filing of bills of exceptions and in various other cases in practice, the computation of time has been to exclude the day of the act done or judgment rendered from the time. Upon all commercial paper, in notes and bills payable in so many days or months from date, the day of date is excluded.

The ordinary and popular meaning which would be attached to this statute, which we think the legislature must have intended, and which in the transactions of business will not be likely to mislead common men, is that the party appealing shall have twenty days within which to file his appeal, not including the day of the return within the twenty days. It should be construed as if it read "within twenty days after the day of the return." By this construction this section harmonizes with the 28th sec. of chap. 47, which provides that appeals may be taken within twenty days from the date of the decision of the probate court. We think the legislature did not intend to have the time computed differently in appeals from ordinary decisions of the probate court, and in appeals from the decisions of commissioners. If, therefore, this appeal was properly filed on the 23d, we think it was in time.

III. The statute requires that it shall be filed in the register's office. The case shows that it was left at the usual residence of

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the judge of probate between the hours of eleven and twelve o'clock at night of the 23d of December, and was filed and lodged in the register's office on the morning of the 24th of December. It does not appear that the appeal came to the possession and knowledge of the judge of probate on the 28d, and from his filing it on the 24th, we infer that it did not come to his possession and knowledge till the 24th. Upon these facts we think that the filing was not a compliance with the statute.

If after the usual business hours of the day are over, and the office is closed, a party to save his rights and bring himself within the statutory time, leaves an appeal in the actual possession of the proper officer to be filed, so that such officer has actual knowledge that it is so left and can then file it, and the officer on the following morning lodges it in the proper office and enters it as filed on the day he actually received it, *nunc pro tunc*, we think such appeal and filing would be regular and within time. For such purposes and out of the usual business hours, its coming to the actual custody and knowledge of the officer may be deemed in contemplation of law a filing in the office, and then it would be the duty of the officer at the earliest usual business hour of the following day to lodge it in the proper office. Hence the leaving it at the dwelling house of the judge of probate instead of the office at that late hour of night, we do not deem fatal to the proceeding. Nor do we think it fatal that it was left at the house of the judge of probate instead of the register, for we know that in practice in this State the duties of the register are very frequently, perhaps we may say usually, performed by the judge, and that it would be fraught with serious practical evils to hold that the acts of the register, when done by the judge, would not be regular and valid, or that the duties of the one might not be interchangeably performed by the other.

But the great and insuperable difficulty in this case is that it does not appear that the appeal was brought to the possession and knowledge of the judge of probate on the 23d. It does not appear that he had any knowledge of it till the 24th. This actual knowledge and possession by the proper public officer is indispensable, and these must exist within the limited time. In many cases it becomes the duty of public officers, as of town

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clerks, to make a note of the hour and minute when a paper is left to be filed, and this is impossible if not brought to his actual knowledge and possession.

For this reason, therefore, we think the appeal in this case was not according to law, and the judgment of the county court is affirmed.

MARTIN ESTY *v.* MARTIN J. LOVE AND NELSON MYERS.

Replevin.

The owner of property, attached in a suit against another, may maintain replevin therefor against the attaching creditor and the officer jointly, when the former assisted in taking the property, and took it into his own possession after the attachment.

REPLEVIN for a horse and harness. The case was referred to a referee who reported certain facts showing that the property replevied belonged to the plaintiff and, while in his possession, was attached and taken in a suit in favor of the defendant Love against one Mallory. The writ on which this attachment was made was served by the defendant Myers, to whom it was directed as an authorized person, but the attachment was made by him under Love's directions, who was with him at the time and assisted him in taking and removing the property, and had it in his actual custody when it was replevied.

Upon this report the county court, at the June Term, 1859,—PIERPOINT, J., presiding,—rendered judgment for the plaintiff, to which the defendants excepted.

U. M. Robinson, for the defendants.

Cushman & Meacham, for the plaintiff.

BARRETT, J. The report of the referee shows a state of facts which upon settled principles of law invests the plaintiff with full

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title to the property in question, both as against Mallory and wife, and their creditors. The counsel for the defendants does not seem to really rely in argument on the want of sufficient title in the plaintiff to entitle him to the possession of the property.

The ground of defence that is relied upon and urged is, that replevin in a case like the present, should be brought solely against the officer who attached the property. This is sought to be maintained upon the authority of *Richardson v. Reed et al.*, and of *Skilton v. Winslow et al.*, 4 Gray 441. In these cases the creditors in the attachment who were made defendants, had nothing to do with the taking or possession of the property except to direct the officer to attach it.

In the present case the attaching creditor not only directed the property to be taken by attachment on his writ, but helped the officer in taking and removing it from the custody of the plaintiff, and immediately took and retained the actual possession of it in concurrence with the officer, up to the time the replevin was served.

This fact so distinguishes this case from those above cited, as to prevent such an analogy as would render those cases authority to sustain the present ground of defence. The decision of those cases is put and made to turn upon the fact that the defendants, upon whose writs the property had been attached, never had either the possession of it or the right of possession. Judge METCALF well says "The writ of replevin assumes that the goods which are to be replevied have been taken, detained or attached by the defendant, and are in his possession or under his control."

All which is true as to the defendant Love in the present case, and true also of the other defendant by his participation and official relation.

It is needless to say how we should decide in a case like those above referred to. There certainly is a creditable show of authority to sustain the ruling of Judge HOAR at *nisi prius*.

It is obvious upon principle, and established by many decisions in this State, that neither the officer nor attaching creditor derives any immunity as against the owner of personal property, from the fact that such property is taken by them upon a writ or execution

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against another person. Both the officer and the creditor stand as naked and unprotected trespassers. And there is no reason why both should not be subject to *replevin* as well as *trespass*, when the creditor actually participated in the original taking, and has the actual possession of the property up to the time of the service of the *replevin*.

The provisions of the statute as to the course of proceeding in *replevin*, when property has been attached not belonging to the debtor, cannot be regarded as controlling or modifying the right of the owner of the property to resort to his *replevin* to obtain possession, and try the title against the person who had an active hand in taking, and continues in the actual possession of it, even though he be the attaching creditor.

The judgment is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDHAM,
AT THE
FEBRUARY TERM, 1860.

PRESENT:

HON. ASA O. ALDIS, HON. JOHN PIERPOINT, HON. JAMES BARRETT, HON. LOYAL C. KELLOGG,	}	ASSISTANT JUDGES.
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CHARLES TOWNE v. GEORGE LEACH, and Trustees LEVI A.
EDGELL AND HIRAM PHELPS, and claimant HIRAM PHELPS.

Trustee process. Practice. Joint Tenants. Claimant. Attachment.

P. and L. made a contract by which L., who owned a patent right, authorized P. to sell the same in certain States of the Union, and it was agreed that P. was to sell the same; that out of all property and money received by P., by means of such sales, the expenses thereof should first be paid, and the remainder should be equally divided between P. and L., and that this division should be made as early as reasonably could be, and from time to time, whenever any such money or property should be received. The transaction of the business thus provided for necessitated the incurring of expenses which did not apply solely to any particular sale, but to the whole business together. *Held*, that under this contract the proceeds of the sales previous

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to a settlement of their expenses, belonged to P. and L. jointly, and no part thereof to either of them severally, and that individual creditors of neither party could by means of the trustee process, attach such party's interest in any of their joint property in the hands of a third person, whether such property was tangible or a debt due from such third person to P. and L.

If in a trustee process the plaintiff, trustee and claimant proceed either in the county court, or before a commissioner, where a commissioner can try the question, to a trial of the claimant's rights upon their real merits, and the substantial claims of the claimant fully appear, and have been tried upon their merits, without objection to the form of proceeding, it is too late to object in the supreme court that no allegations have been filed by the claimant.

In a trustee process, where a claimant is cited in or appears voluntarily, and his claim affects or determines the liability of the trustee to the plaintiff, the case, so far as the conflicting rights of the plaintiff and claimant are concerned, is within the jurisdiction of a commissioner, and his decision is conclusive, as to the facts upon which the decision of the case must turn.

TRUSTEE PROCESS. The commissioner reported that in February, 1856, Hiram Phelps left with the trustee a quantity of dry goods for sale on commission, which Phelps then informed him belonged to himself alone, but that he afterwards told him that they belonged to himself and the defendant, Leach, as partners; that before the service of this trustee process the trustee had paid to Phelps from the avails of the sale of a part of such goods three hundred and twenty-five dollars, and that there still remained in Edgell's hands money from such sales, and goods unsold, amounting in all, in value, to two hundred seven dollars and seventy-two cents; that on the first of November, 1855, the defendant, Leach, and the trustee and claimant, Phelps, entered into a contract by which the former gave the latter a power of attorney to sell a certain patent right for a "grain cleaner," in all the New England States, Ohio, and certain counties in the State of New York; that by this contract it was agreed that Phelps should sell such patent right in districts of territory within the prescribed limits, with diligence and prudence; that he would at reasonable times render to Leach a true account of all business transacted by him under such power of attorney, and would pay over to Leach all money, property and choses in action received by him in the transaction of such business, to which under the terms of such agreement, Leach should be entitled;

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that out of all the money, property and choses in action received by Phelps by reason of all or any of such business, all necessary expenses incurred therein, (exclusive of all other transactions or business) should first be paid, and the remainder should be equally divided between Phelps and Leach, and that one-half thereof should become the property of each respectively, which division should be made as early as reasonably could be, and also from time to time whenever any such money, property, etc., should be received by Phelps. The commissioner further reported that the goods left with Edgell by Phelps were received by the latter for the sale of certain territorial rights in such patent right, which sale was made in pursuance of the contract between Phelps and Leach above set forth, and that Phelps continued doing business under such contract and power of attorney until June 19th, 1856, when Leach revoked the latter.

Before the commissioner Phelps insisted that by force of such contract he and Leach became partners, and that their partnership accounts could not be settled by this mode of process, but this objection was overruled by the commissioner. Phelps then offered to prove that for a period of five months, including the date when he received the goods left by him with Edgell, Leach and Phelps sold other portions of such specified patent right territory, in some of which sales Leach participated, and in others Phelps acted alone; that in some of these sales the expenses were paid by Leach, and in others by Phelps, and that sometimes the proceeds were taken by one party and sometimes by the other; that a large indebtedness was incurred by them for castings necessary for presenting the patented article for sale; that before these castings were finished, and before any settlement or adjustment between him and Leach, he received notice of the revocation of the power of attorney by Leach, since which time he had made no further sales, and had had no settlement or accounting with Leach, and that upon a just account of all the transactions under the contract a balance would be due to Phelps.

But the commissioner held such testimony inadmissible, and decided that each transaction under the contract was to be adjusted by itself, and that Phelps had no lien upon the balance of the avails of any one operation to secure him for advances in

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any other, and that upon the foregoing facts, Edgell was trustee of Leach for the sum of two hundred seven dollars seventy-two cents.

Upon this report the county court, at the September Term, 1859,—REDFIELD, Ch. J., presiding,—adjudged Edgell chargeable as trustee for the amount reported by the commissioner, to which the claimant, Phelps excepted.

Bradley & Kellogg, for the claimant.

1. Were Phelps and Leach co-partners?

Phelps contributed his time and services; Leach his patent and as much time as he might be able to. They divided equally the profit and loss. There was a community of interest.

2. Can co-partnership funds be reached by trustee process, brought upon the separate debt of one of the co-partners?

This is to us a novel way of winding up the affairs of a co-partnership. The creditors of a co-partnership ought to have notice and be made parties.

If a lien could be created upon partnership funds in the manner here attempted, we should not suppose it could be done until the creditors of such co-partnership were fully paid.

If the creditors must first be paid, then Phelps, who is a creditor, would absorb the entire fund.

We do not see how the construction of the contract contended for by the plaintiff can effect the rights of the parties. If each sale was to be settled by itself, still we insist that one partner cannot neglect to affect the division until his co-partner has by disbursements in the business far exceeded the value of the co-partnership property, and then demand the funds.

But the construction contended for is not the true one, nor the true import of the language used in the contract, "exclusive of all *other* transactions or business."

The word *other* refers to any *other* business connected with any other patent right, at least not connected with the "improved grain cleaner."

Neither the power of attorney nor its revocation can affect the rights of the parties, for the claim of Phelps for expenses and disbursements occurred before the revocation.

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The creditors of Leach cannot acquire any rights nor enforce any claim as against Phelps, that Leach himself could not.

Stoughton & Grant, for the plaintiff.

The contract between Leach and Phelps did not constitute them partners Phelps had no ownership in the patent or territory; they were not to share in the profits or losses. What Phelps was to receive was in compensation for his services and disbursements; *Amber v. Bradley*, 6 Vt. 119; *Boardman v. Keeler & Allen*, 2 Vt. 65, and cases there cited; *Bowman et al. v. Bailey*, 10 Vt. 170; *Clement v. Hadlock*, 13 N. H. 186; *Newman v. Bean*, 1 Foster (N. H.) 93; *Rice v. Austin*, 17 Mass. 197; *Deny et al. v. Cabot et al.*, 6 Metcalf 82; *Holmes et al. v. Old Colony R. R. Co.*, 5 Gray 58, and cases there cited; *Bradley et al. v. White et al.*, 10 Met. 303.

Phelps claims that he has a lien upon this money to reimburse him for advancements made in other transactions, but it is not claimed that he has made advancements or incurred expenses in this particular transaction. By the terms of the contract Phelps has no lien upon the money realized from this sale or transaction to reimburse him for advancements and expenditures in other transactions; *Deny et al. v. Cabot et al.*, 6 Met 93. And he has no right to hold on upon the proceeds of any particular sale for the purposes of a general settlement. The idea of the division or settlement of the general result embracing all the transactions is expressly negatived. Each transaction stands by itself, is independent of all others, and the accounting for and division of the proceeds thereof are to be made "*from time to time whenever such money, property, etc., shall be acquired or received.*" Here then was an independent transaction, a distinct sale and acquisition of property, one moiety of which belonged to Leach, and as there is no claim for expenses or disbursements in this transaction, the evidence was properly rejected. And as Phelps has taken much more than half of the property, the plaintiff is entitled to hold, by this process, the residue as the property of Leach. It will be noticed that the contract does not require the property acquired to be converted into money before division. The specific property is to be divided, and one-half of it vested in Leach

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as soon as acquired. One half of the property put into Edgell's hands belonged to Leach, and because the trustee has converted it into money, can Phelps hold it as against the *bona fide* creditors of Leach?

Phelps has appeared as claimant of this property, but the case shows no allegations of the nature of his claim, (see Comp. Stat., p. 263,) and the court is asked to aid him by permitting these funds to go into his hands, in *anticipation* of a balance in his favor on final settlement. What has the court to do with this final settlement? If we were proceeding against Phelps as trustee, the question might arise. But we wish to charge Edgell for the proceeds of property for which Leach could have sustained trover against Phelps, had Phelps wrongfully converted it, and we apprehend that the court will not step outside of the contract, to aid an uncertain claimant against a *bona fide* creditor.

ALDIS, J. The plaintiff summons L. A. Edgell and H. Phelps as trustees of one George Leach. Edgell files a disclosure in which he states that the goods and moneys in his hands were delivered to him by Phelps as his; that afterwards Phelps said they belonged to Leach and Phelps as partners. He also states that Leach claims that they belong solely to him, and prays that Phelps may be cited in as claimant to maintain their rights.

Upon the disclosure the question as to the liability of the trustee would be, first, are the goods the sole property of Leach? if so, the trustee would be liable; second, are they the partnership property of Leach and Phelps, and if so, can they be held by trustee process to answer upon Leach's individual debt? third, are they the sole property of Phelps, or has he such a joint interest as to defeat their being held for the debts of Leach?

In this state of the case Phelps also enters as claimant. The case is then referred to a commissioner, and the commissioner summons the parties who appear before him, Phelps appearing as claimant as well as trustee.

The commissioner reports that Leach owned a patent; that he and Phelps entered into an agreement for the sale of it to different districts of territory, and for incurring expenses in the business, and that the proceeds of the sales should be applied, first,

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to pay expenses, and then to be divided between them ; that there were various other stipulations in the agreement ; that the goods and funds in the hands of the trustee were the proceeds of the sales of the patent under this contract, and were delivered by Phelps to the trustee, and that Phelps after that continued to do business under the contract till Leach put an end to the agreement. The contract between Leach and Phelps as to this business was in writing, and is set forth in the report. These facts are found by the commissioner, and do not appear to have been objected to by any of the parties, upon any ground.

Phelps then insisted that the contract between him and Leach was a partnership, and that therefore the trustee could not be held liable for partnership funds upon the individual debt of one of the partners ; but the commissioner, *pro forma*, overruled this point.

Phelps then offered to prove that he and Leach, for a period before and after they acquired these goods, continued to do business under the contract, and incurred debts, large liabilities for castings and expenses, made various sales of the patent, and had unsettled accounts and dealings under the contract, and that on a just settlement there would be a balance due him from Leach. The commissioner construed the contract to mean that each transaction under it must be settled by itself, and that Phelps had no lien upon the balance of profits derived from any one operation to secure him for advances in any other, and therefore so construing the contract, held that in this one operation there was a balance coming to Leach, and which might be treated as belonging to Leach solely, and therefore that Edgell was liable ; and he excluded the evidence for the purpose of presenting to the court the question as to the construction of the contract.

Upon the facts as found, and upon the contract as set forth, the counsel for Phelps contend, first, that Phelps and Leach were partners, and if so, their partnership funds cannot be applied to pay the individual debts of one of the partners, or be held liable by trustee process in a suit against one partner, when the other objects ; second, that if the contract does not create a partnership strictly, still, the goods belonged to them jointly, and could not be divided or held as the separate property of either party, until

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after a settlement, and till all their debts and expenses, whether joint or several, had been paid out of the joint fund, and the balance then on hand had been severed and divided between them, and that the funds in the hands of the trustee, being thus their joint property and liable for the subsequent expenses and transactions of Phelps, could not be held liable on Leach's debts.

The plaintiff, on the other hand, contends that by the contract the proceeds of the sales of the patent were the sole property of Leach, and so liable on his debts. Hence, the first question is as to the true construction of the contract.

We think that the intention of the parties in making the contract was, that the proceeds of the sales should belong to them jointly, and not to Leach individually. This is fairly inferable from the considerations, first, that such proceeds were the products of their joint means, one furnishing the patent right, the other the necessary expenses to present it for sale, and contributing his time and labor to effect the sales; secondly, the expenses were to be taken out of the proceeds of the sales, and then the remainder was to be equally divided between them, and one-half of such remainder to be delivered to and become the property of each one of them. This fairly implies that before division the ownership was to be joint. The property was to be liable for all debts and expenses, and could not be divided till they were first deducted. This is the express provision of the contract. By this provision an express lien on all their property was created for the payment of all debts and expenses, and forbidding a division till such payment had been made; a lien similar to that which is implied in law between partners.

The referee assumes that each separate transaction in the sale of the patent was to be settled by itself. But this does not seem to be warranted by the contract. The settlements and division between Phelps and Leach were to be at as early a time as could reasonably be, and be made from time to time as property or money should be received by Phelps.

It is obvious that large sales and numerous transactions were contemplated, and these might be upon credit. Large expenses might be incurred, and these, as for the castings, could not be separately applied to any one sale of the patent, but were intended

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for many, if not for all. The territory within which the right to use and vend the patent was to be sold comprised New England, Ohio and part of New York. The expenses to be incurred for the sale of the patent would, to a great extent, be the same for one county, district or State as for another, and no distinction could be made as to the expenses incurred for any particular sale.

It is obvious that the settlements and divisions of property would be regulated by periods of time, and would comprise all transactions and expenses up to such times, and that it would have been difficult, if not impossible, to settle by separate transactions, for the expenses could not be so distinguished. Again, they could not tell that there would be any future sales, and hence all expenses ought to be deducted up to the time of each settlement.

This being the agreement of the parties, each settlement would include a full accounting up to the time of settlement, and all expenses would be a charge upon the avails, and there could be no division of the fund or avails till all the debts and expenses had first been deducted.

Upon this construction of the contract it results, first, that Leach has no separate interest in the funds in the hands of the trustee, but his interest, if any, is joint with Phelps; second, that whether he has any interest at all can only be determined by an accounting and settlement with Phelps of all their transactions growing out of the contract for the sale of the patent. In this view it is needless to inquire whether they were strictly partners or not, for if their contract gave them a joint interest in the proceeds of the sale, and subjected the proceeds to the payment of all debts and expenses before they could be severed as between the parties, the result as to the liability of the trustee must be the same as if they were partners in the strictest sense.

The plaintiff is a creditor of Leach; he has no debt against Phelps, or against Phelps and Leach jointly, and his debt does not appear to have had any connection with their enterprise as to the vending of the patent right. He can have no greater right to the fund in the hands of the trustee than Leach has. Clearly then, he cannot claim to hold the half of the net profits arising from the single transaction now in question, and the decision of the commissioner and of the county court, that the balance com-

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ing to Leach upon this separate transaction might be so held without reference to the other dealings and transactions of the parties, was erroneous.

While the goods thus jointly owned were in the hands of Edgell, they might have been attached at law by a separate creditor of Leach, although in equity the creditor would be restrained from proceeding to sell them until the joint creditors had been first paid; *Washburn v. B. F. Bank*, 19 Vt. 272; can they be held by trustee process upon the separate debt of a creditor when the other part owner objects, as in this case? If so, then the judgment should be reversed, and the case remanded to the commissioner to take the account and ascertain the balance.

Objections are very obvious to such a proceeding, both from the nature of the trustee process and the evils which would arise from the practical application of the rule.

1. The trustee is not liable to Leach alone, he is only liable to Leach and Phelps. He has no goods or credits belonging to Leach. Leach could not maintain an action against him for the funds he holds. Strictly then, he has no goods, effects or credits of the principal debtor. It has been held that one summoned as a trustee is not bound to disclose as to funds of the principal debtor which a partnership, of which he is a member, holds, and a debt due from the partnership is not thereby attached; *Knapp v. Levenway and trustee*, 27 Vt. 298. There is an analogy between that case and the one at bar in this, that there is the same want of legal privity between the parties here as there, an attempt to hold a joint fund by virtue of a several and separate liability, of one of the owners of the fund.

2. If the separate creditor of Leach proceeds to take an accounting, clearly his lien to the particular fund in the hands of this trustee ceases, and he pursues only the balance due Leach on a settlement of this and all other transactions. This, in effect, annuls the lien by this suit and changes it into a bill in equity, to settle the partnership. Such an application of the trustee process to the exercise of chancery powers for the settlement of partnerships and other joint adventures would be impracticable, full of mischiefs, and could never have been intended by the Legislature. A separate creditor of one partner or joint contractor,

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could at any time by the trustee process compel the application of partnership funds to the payment of the separate debt of the partner (which the partner himself could not do without fraud,) or else force the partnership into a liquidation and settlement of all their affairs, in order to ascertain the several interests of one partner. This would be unjust and intolerable.

And although the evil would be less where the partnership or joint adventure was dissolved, still the process is wholly unsuitable for and could never have been intended to apply to such a purpose. Upon the facts as found by the commissioner, we think the trustee could not be held liable to the separate creditor of Leach.

Objection has been made upon this hearing that the claimant does not appear to have filed any allegations of his claim, and so no issue can properly have been formed as to his rights. Nothing appears as to whether allegations have or have not been filed, though counsel seem to admit now have been filed.

The statute provides that a claimant may allege and prove any facts material to his claim. The form and mode of alleging the facts is not prescribed by statute, but must be governed by the rules of practice and subject to the discretion of the court; and if all the parties waive all questions as to the forms of proceeding and proceed either in the county court, or before the commissioner, in a case where the commissioner can try the question, to a trial of the claimant's rights upon their real merits; and if on such trial the substantial claims of the claimant fully appear in the report of the commissioner on the case as stated by the court, and have been adjudicated upon as to their merits without objection to the form of proceeding, we think the party can not, for the first time in this court, raise the objection to the irregularity in the mode of presenting the claim by the claimant. Such appears to us to be this objection in this case. Had it been made in the court below the defect would, doubtless, have been cured by amendment by leave of the court.

It is said, however, that by the statute of 1853, the commissioner has no power to try the rights of the claimant; but they must be tried in the county court, and by court or jury.

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That act provides that the commissioner shall take the disclosure of the trustee and hear and examine testimony in respect to the liability of the trustee, and determine all questions arising in respect to such liability, and report to the court the facts in respect to such liability with his decision thereon.

As the commissioner is to hear all testimony and determine all questions in respect to the liability of the trustee, it seems to us that he is not confined to the sole question of whether there are funds in the hands of the trustee. The liability of the trustee is not to be understood in this narrow and restricted sense. His liability depends not upon that sole question, whether he has funds, but upon the further question, do those funds belong to the principal debtor. If the trustee knows facts which show they do not belong to the principal debtor, he is not protected unless he disclose them. So if he knows there are different claimants and doubtful questions as to the character and ownership of the funds, he should, as he has done in this case, set forth the facts in his disclosure and pray that the parties interested may be cited in to assert their rights. If they are cited in, or appear voluntarily, and their claims affect or determine the question of the liability of the trustee, then, we think, the statute of 1853 applies and the question may go to a commissioner. Here the question as to the liability of the trustee depends upon whether the funds are the separate property of Leach, or the joint property of Leach and Phelps, and subject to an accounting under their contract. This question is raised by the disclosure, and its decision determines whether the trustee is or is not liable.

The question is not as to the proportions in which Leach and Phelps may be interested in the fund, but whether the fund can be held by a creditor of Leach. It does not establish Phelps' claim to the fund as between him and Leach; it only defeats the claim of the plaintiff to hold the trustees liable to him for the fund.

As the whole claim of the claimants affects only "the question arising in respect to the liability of the trustee," (to use the words of the statute) we think the statute of 1853 applies, and that the commissioner had authority to try and decide the question.

In *Russell v. Thayer*, 30 Vt. 526, the court held that as the

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question which settled the rights of the claimant was the same as that which settled the liability of the trustee, the commissioner had authority under the act of 1853 to decide the point. There the claimant and the trustee were the same person. The court in that case says: "The question of Thayer's liability as trustee involved, covered and exhausted the entire ground on which his right as claimant rested." So we hold in this case, that the question of the liability of the trustee covers the entire ground on which the right of the claimant rests: if the one is established the other must fail. It can make no difference whether the trustee and claimant are one and the same, or different persons, provided, that the question as to the right of one involves and settles the liability of the other.

We think, therefore, that the commissioner had jurisdiction of the subject matter, and that his report must be held as settling the facts upon which the decision of the case must turn. And upon the construction we give to the contract, and the view which we take of the law, we think that the trustee can not be held liable, and that the judgment must be reversed and judgment rendered, that the trustee is not liable, and that the claimant, Phelps, recover his costs of the plaintiff.

BARRETT, J., dissenting. Edgell and Phelps are severally summoned as the trustees of Leach. Edgell alone is pursued as trustee. The case was referred to a commissioner to take his disclosure and report facts. Phelps entered as claimant. The case proceeded to judgment against the debtor, and also against Edgell as his trustee. To the judgment against Edgell, Phelps as claimant, took exceptions, and thereon the case is now before this court. We are to revise it and ascertain whether error in point of law was committed against Phelps in rendering it.

The statute contemplates that a party coming in as claimant shall draw up and file allegations, setting forth his claim to the property or credit sought to be reached by the pending process, that issue may be taken thereon by the plaintiff, and a trial be had either by the court or the jury, as the court shall direct; Comp. Stat., ch. 32, secs. 53, 54, 55. In this case Phelps filed no allegations, nor was any issue formed as to any right or claim

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that he might have, nor was any mode of trying his claim directed by the court, nor any proceeding had in reference to it. All that the case shows as to any proceeding by him or in his behalf is, that he appeared before the commissioner, whose business was solely to hear the matter as between the plaintiff and the trustee, and there offered to prove certain facts. The commissioner rejected said offer, and as it seems to me for very good reasons. The matter of the claimant's claim was not within the scope of his commission, nor does it appear that the plaintiff or the trustee was assenting that the commissioner should take cognizance and proceed with the trial of it. The law of 1853 does not contemplate that the matter between the plaintiff and a claimant should be referred to a commissioner, but only the matter between the primary parties to the suit.

The facts found upon the disclosure of Edgell and the papers laid before the commissioner show that Edgell had received property and the avails of property, in which Leach primarily had an interest, and *prima facie* to the extent of one-half of the avails of the property thus received. Of said avails it appeared that more than one-half had been paid over to Phelps, the claimant, thus leaving the residue, both lawfully and equitably, as between Leach and Phelps, the property of Leach. Whether Leach was entitled to the property and funds remaining in Edgell's hands, as between Leach and Phelps, could only be controverted by Phelps, by showing matter outside and beyond the relation existing between them by force of the papers exhibited, and depending on matters resting *in pais*, which, in order to be available to Phelps as against the plaintiff, should have been in some manner alleged, so that issue might be taken thereon, and a trial had in due form of law.

Only in two respects does it seem to me that any question of error is presented by the case, as it is now before us; *first*, the rejection of the evidence offered by Phelps before the commissioner, by which he claims that he has been improperly prevented from showing his right as claimant. As already intimated, I do not regard the action of the commissioner in this respect to have been erroneous, and for the reason that no matter was before him that required him to go into a hearing of the claimant's

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claim, as there was no allegation or issue on that subject, and no order of the court, such as is provided for and contemplated by the statute in that behalf. If, through negligence or misapprehension, Phelps found himself out of place in respect to his right to show his grounds of claim before the commissioner, it seems to me that his proper course was, before coming to this court, to have filed his allegations by leave of the county court, and proceeded to a hearing in due course in that court, and then upon a case properly made up, if the judgment had been against him, he could have come upon a proper footing into this court to assert and maintain his legal rights.

Secondly, does the case show that the judgment is without legal foundation? I think not. On the contrary, it seems to me to show that it has legal foundation, and in the absence of further showing, by the claimant, of other ground and reason for his claim to the property, I think the judgment was right; that is to say, I think the case shows funds of Leach in Edgell's hands, which, upon the facts now shown, it does not appear that Phelps has either the legal or equitable right to fasten upon, and that his right to do so can only be substantiated by his showing the facts that he offered to prove before the commissioner, which offer was, in my opinion as above stated, properly rejected.

Again, I have difficulty in seeing how Phelps is in position as the case now stands, to be properly complaining of the judgment of the county court. He was before that court as claimant. The judgment was in favor of the plaintiff upon the trustee's disclosure and the facts reported by the commissioner. Not having filed any allegations of claim, and thereby put himself in the position of a party litigant, of course the matter was proceeding as it properly should, in the same way as if he had not entered. It was proceeding between the plaintiff and the trustee.

The trustee is not complaining of, or excepting to the judgment. He is willing to stand the hazard of liability under the disclosure and the finding of the commissioner, and the judgment of the county court, leaving Phelps to pursue his rights in such way, legitimate or illegitimate, as he may see fit to adopt.

In my opinion the reversing of the judgment involves the virtual ignoring of the provisions of sections 53, 54 and 55 of chap.

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32 of the Comp. Stat., and the engrafting of a new section into the trustee act of 1853, in addition to the general trustee law, and moreover will be incongruous with some features of the decision in *Russell v. Thayer et al.*, 30 Vt. 525, the opinion in which embodied, as I understood at the time, the concurrent views of the several members of the court who sat in the trial of the case.

I regret my inability to concur in the result in which my brethren agree, and dismiss the subject with this comprehensive statement of the reasons which lead me to dissent.

AARON FULTON v. ROBERT WILEY.

Reference. Offset.

If a cause be referred before any plea in offset has been filed, and the rule of reference does not provide for the adjustment of claims in offset, the referee has no authority to consider any such claims.

ASSUMPSIT. The opinion of the court sufficiently sets forth all the material facts in the case.

The county court, at the April Term, 1859,—REDFIELD, Ch. J. presiding,—rendered judgment for the defendant for the excess of the note, offered by him in offset, over the amount of the plaintiffs' claim, as found due by the referee, to which the plaintiff excepted.

George Howe, for the plaintiff.

Bradley & Kellogg, for the defendant.

PIERPOINT, J. The question in this case arises upon the report of a referee.

The action was assumpsit. The declaration contained the general counts only. The case was referred.

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No plea in offset was filed.

On the trial before the referee the defendant offered in evidence a note against the plaintiff which he claimed should be set off against the amount that might be found due the plaintiff.

The referee finds that the note is justly due from the plaintiff, but refers the question to the court, whether it can be allowed in offset to the plaintiff's claim, and if not, he reports that there should be judgment for the plaintiff for \$27,25.

The county court allowed it as an offset, so far as to balance the claim of the plaintiff, and rendered a judgment in favor of the defendant, for the remainder due on the note.

If this case had been tried in the county court, it is very clear that the defendant could have availed himself of the note, only by a plea in offset. But it is said that upon the trial before the referee, the same rule does not apply.

It is undoubtedly true that when a case is referred, on the trial before the referees, the plaintiff may present the claim on which the suit is based in any manner that he could have presented the same claim before the county court, under any declaration that the county court would have allowed him to file, for the same cause of action; that all objections to the form of the declaration are waived by the reference, and this rule we understand to be reciprocal: that the defendant may interpose any defence to the plaintiff's right of action before the referee, that he could interpose, if the case was on trial in the county court, under any form of pleading, that would be an appropriate answer to the alleged cause of action.

But we do not understand this rule on either side to extend to the introduction of any new subject matter of litigation; the plaintiff must be confined to the original cause of action; and the defendant must be confined to a legitimate answer to that cause of action.

An offset cannot be said to be an answer to the plaintiff's claim or to his right of action; it is conceding the claim of the plaintiff, and his right to recover thereon, and then setting up a counter claim in his favor against the plaintiff and asking the court to make the application. It is introducing an entirely new and dis-

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tinct subject matter of litigation, one that is separate from, and independent of, the one declared upon, one that is in no sense embraced in the subject matter referred. To allow it would be to introduce a controversy as foreign from the matter referred, as would be any claim of the plaintiff separate and distinct from the one declared upon. And there would be no more propriety in allowing the introduction of the one than the other.

If the defendant would avail himself of an offset to the plaintiff's claim, he can do it only by a plea for that purpose, and if he neglects to avail himself of such plea by filing it before the case is referred, he can not avail himself of such defence before the referee.

If the defendant files a plea in offset, the plaintiff may then, by his replication thereto, bring in any other cause of action he may have against the defendant, proper to be presented as an offset to the defendant's claim.

If all this is done before the suit is referred, the reference carries the whole matter before the referee, and an examination of the pleadings show precisely what is referred and what the parties are to meet. But to allow the reference to have that effect before the pleas in offset are filed, would turn every reference of a suit in court into a general reference of all matters in controversy between the parties.

It would seem that the county court in rendering their judgment in this case, proceeded upon the supposition that a plea in offset had been filed, as they not only offset enough of the defendant's claim to cancel the claim of the plaintiff, but rendered a judgment in favor of the defendant for the balance of his claim, both of which we think were erroneous, no plea having been filed.

The result is, the judgment of the county court is reversed, and, as in cases like the present, this court will render such judgment as we think the county court ought to have rendered, judgment is rendered for the plaintiff for twenty-seven dollars and thirty-five cents and costs.

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JOHN WILDER v. S. E. WEATHERHEAD and Trustee, TYLER.
L. JOHNSON.

Trustee process.

If a trustee, under an arrangement with the first trusteeing creditor and the defendant, pay his debt to such creditor, and the latter does not prosecute his suit to judgment against the trustee, as well as the debtor, the trustee is still liable to a subsequent trusteeing creditor not a party to such arrangement, who does complete his judgment, and whose process was served prior to such arrangement. And the rule is the same whether the defendant's claim against the trustee is payable in money or in specific articles.

TRUSTEE PROCESS. From the commissioner's report it appeared that on the 22d of March, 1856, the trustee, Johnson, was indebted to the defendant in cash thirty-one dollars and forty-six cents, and in slate of second quality to the amount of one hundred and eighty dollars, payable on demand, at the trustee's quarry, and that on that day one Jacobs, one Gregory, and the plaintiff brought their several actions against the defendant, and in the order above named, and each trusteeed Johnson therein.

Shortly afterwards, Johnson, acting in good faith and supposing that he was holden to pay the defendant's creditors, who had trusteeed him, in the order of their attachments, so far as the credits in his hands would go, accepted an order drawn by the defendant in favor of Jacobs, the first trusteeing creditor, for thirty-one dollars and sixty-six cents cash and thirty-nine dollars and sixty-four cents in slate, being the full amount of Jacob's claim against the defendant, and Jacobs never entered his suit in court, which acceptance Johnson afterwards paid.

On the same day Johnson accepted and subsequently paid another order drawn on him by the defendant in favor of Gregory, the second trusteeing creditor, for the remainder of the slate which he was owing to the defendant, being in value one hundred and forty dollars and thirty-six cents, which was not the full amount of Gregory's claim, who accordingly entered his suit in court, and took judgment and execution at the April Term, 1856, for the whole of his claim against the defendant, but the suit was not entered against the trustee, Johnson, who was notified by Jacobs and Gregory at the time of paying the orders, that he was discharged by them respectively.

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The plaintiff did not assent to these arrangements made by the defendant, Jacobs, Gregory and Johnson, and it did not appear that he knew anything about them till they were ended.

Upon these facts, the county court, at the April Term, 1859,—**REDFIELD**, Ch. J., presiding,—adjudged the trustee chargeable, to which the trustee excepted.

George Howe, for the trustee.

E. Kirkland, for the plaintiff.

BARRETT, J. Johnson, the trustee, being indebted to Weatherhead, the defendant, in the sum of thirty-one dollars and forty-six cents to be paid in cash, and the sum of one hundred and eighty dollars to be paid in slate of second quality, on demand, at the trustee's quarry, was successively served with trustee processes, one in favor of Jacobs against Weatherhead, one in favor of Gregory against the same, and one in favor of this plaintiff against the same, (being that now before the court.) The propriety of the adjustment of the amount due from the trustee to the defendant, made by them, is not questioned.

The only question to be decided is, whether the payment made by the trustee to Gregory acquits him of liability to be adjudged trustee in favor of the plaintiff in this suit.

As to said indebtedness of one hundred and eighty dollars, the trustee could not be held as for having in his possession specific chattels belonging to the defendant, but only as for an indebtedness, arising upon a written contract, which was to be paid in a specified kind of personal property, viz: slate of second quality, at the trustee's quarry.

Whatever right said several creditors acquired in reference to that property, was in virtue of the service and prosecution of their respective trustee processes, conformably to the provisions of the statute. An inchoate *lien* was created by the service of said processes, that created by the subsequent being in subjection to that created by the prior service.

The liability of Johnson, as trustee under the process of any of said creditors, could only be perfected and fixed by a final

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judgment against both himself and the principal debtor. The right of the several creditors, as between themselves, by virtue of their successive processes, to reach the goods, effects and credits of their debtor in the hands of a third person, as trustee of such debtor, is a matter of strict law, and unless the creditor in the prior process perfects his right against the trustee, by obtaining final judgment that may be enforced in the manner provided by the statute, his process will fail to postpone or defeat the creditors in the subsequent processes in reaching such goods, effects and credits. As the trustee can be charged with liability to any creditor only by force of final judgment obtained under the process, if he volunteers to favor a creditor in a prior process, when several successive processes are pending at the same time, by paying to him the trust fund, or delivering to him the trust property, without such final judgment having been obtained, he does it at the hazard of having to answer upon judgments that the creditors in the subsequent processes may obtain.

The design of the statute as to trustee process is to enable the interest of the debtor in personal property, and his rights and credits, in the hands of third persons, to be attached and made available by his creditors, in the manner provided in said statute. The rights of creditors, as between themselves, in the use and efficacy of this form of process, stand in strict analogy to their rights under attachments made upon ordinary *mesne* process. The law contemplates that the trustee himself shall be a mere passive stakeholder, yielding only to the compulsive force of final judgment duly obtained by any given creditor or creditors.

The case of *Munger v. Fletcher*, 2 Vt. 524, is not inconsistent with this view. That was an action on the case to recover damage for the misbehavior of the sheriff, in selling property under an arrangement between several successive attaching creditors before judgments had been obtained. It appeared that he sold it for more than it would have brought if he had kept and sold it upon the executions, when obtained. Such executions were subsequently obtained in due course, and seasonably delivered to the sheriff to charge the property that had been attached and thus sold by him. He applied the proceeds of the property thus sold upon said executions, in the order of their priority, and they were

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exhausted before reaching the plaintiff, who was the last of six successive attaching creditors, but was not party to the arrangement under which the sheriff made said sale of the property attached.

The court held that as the case showed that the plaintiff had suffered no damage by the course thus taken with the property, he was not entitled to recover.

In the present case the question is, whether the property has been so withdrawn from the trustee's hands by process of law, and in pursuance of its provisions, as to disentitle the plaintiff to claim a judgment for it against the trustee.

The principle of the case of *The Brandon Iron Co. v. Gleason*, 24 Vt. 228, of *Hall v. Walbridge*, 2 Aik. 215. and of *Murray v. Eldridge*, 2 Vt. 338, seems to be applicable and controlling in the present case. In *The Brandon Iron Co. v. Gleason*, the case of *Munger v. Fletcher* is considered, and the true view of it is presented by the learned Judge who delivered the opinion of the court.

As already indicated, a judgment in favor of Gregory against the trustee, as well as against the debtor, was necessary in order to perfect his lien acquired by the original service of his process, and to give him any right to claim and take the property from the hands of the trustee. As Gregory failed to perfect that lien and right, the plaintiff thereupon succeeded to the unobstructed right, by pursuing his suit to judgment, to claim and hold of the trustee the property that had become changed in his hands by the original service of his trustee process.

If it were proper for us to permit a regard for real or supposed equities to countervail the operation of explicit provisions of the statute, and well settled principles and rules of the common law, the trustee in this case might seem entitled to some immunity from his peril of having to pay twice what he was owing to the defendant. But as the law was open before him, and thereby he was entirely safe from such peril, so long as he saw fit to abide by the law, it would hardly be allowable for this court to save him from the consequences of his own improvidence by denying to the plaintiff the rights which the law accords to him. We think the judgment of the county court was right, and it is affirmed.

Walker v. Miner.

WILLIAM WALKER v. EVERETT D. MINER.

School districts. Taxes. Grand list.

A person resident in a school district on the first of April and properly listed there, remains subject to taxation therein upon such list while it remains in force, notwithstanding he has subsequently removed from the district.

The officers of a school district hold their office until their successors are legally chosen.

The neglect to comply with the provision of the statute requiring the warrant for the collection of a school tax to specify a limited time within which the tax is to be collected, is not a defect of which a person taxed can take advantage; and though it may render the warrant informal and defective as between the district and the collector, it does not invalidate the action taken by the latter to collect the tax.

TRESPASS for taking two wagons. Plea, the general issue, with notice of justification that the defendant took the property as collector of school district No. 5, in Dover.

The parties agreed upon the following facts :

The plaintiff, on the 1st of April, 1854, resided in Dover, within the limits of school district No. 5, and was legally taxable there, and his poll and personal property were set in the grand list for 1854 of that town, and thereon designated as belonging to district No. 5. He continued to reside there until December 28th, 1854, when he removed to Winchester, New Hampshire, where he has since resided. The school house in that district was consumed by fire December 25th, 1854. At a meeting of the voters of that district, duly warned, held on the 17th of January, 1855, it was voted to raise a sum not to exceed two hundred and fifty dollars to defray the expenses of building and furnishing a school house in that district. It was further voted to choose a building committee, and one was chosen, and during the summer of 1855 a school house was built and occupied by the district. At the annual meeting of the district, duly warned, and held on the 15th of October, 1855, a prudential committee of three was elected, and the defendant was chosen collector. On the 10th of December, 1855, a tax bill was made out by the prudential committee so elected, upon the grand list of 1854, for t' e

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purpose of defraying the expenses of building and furnishing their school house, in which the plaintiff was assessed the sum of seventeen dollars and sixty-four cents. Previous to 1856 the annual meetings of the district had been held in October, but at a meeting duly warned, held on the 5th of April, 1856, the district changed the time of their annual meeting to April, and at the same meeting re-elected the same prudential committee and the same collector elected in October previous, and after that time the annual meetings were held in April of each year. The persons assessed in the tax bill made out in December, 1855, as above mentioned, mostly paid their taxes to the prudential committee, but the plaintiff and a few others neglected to pay, and the tax bill with warrant attached thereto, together with two other tax bills on the grand list of 1855 and 1856, respectively, was delivered to the defendant to collect on the 12th of November, 1856. These three tax bills were connected together in a small book and separately certified by the prudential committee in office when they were placed in the collector's hands. There was but one warrant for the three tax bills, and it was written in the book containing the tax bills. This warrant required the defendant "to collect of the several persons named in the *lists* herewith committed to you the sums of money annexed to the name of each person respectively and pay the same to the prudential committee of said district." No time was limited in the warrant for the collection and payment of these taxes to the prudential committee. The defendant, on receiving the warrant and tax bills, endorsed on the book containing them, a memorandum as follows, viz: "November 12th, 1856: Received of James Lyman and M. P. Cooper, prudential committee in district No. 5, one tax bill for collection," and subscribed it.

The plaintiff refused to pay said tax of seventeen dollars and sixty-four cents against him, and the defendant, as collector, before the annual meeting in April, 1857, distrained and sold the two wagons in question.

It was further agreed by the parties that all the proceedings of the defendant subsequent to receiving the rate bill and warrant were regular.

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Upon these facts the county court, at the April Term, 1858,—**REDFIELD**, Ch. J., presiding,—rendered judgment *pro forma* for the plaintiff for the value of the wagons, to which the defendant excepted.

Davenport & Haskins, for the defendant.

Charles K. Field, for the plaintiff.

KELLOGG, J. This is an action of trespass for taking and carrying away a buggy wagon and a lumber wagon, belonging to the plaintiff, and the defendant justifies the trespass complained of on the ground that he, being the collector of taxes of school district No. 5 in Dover, took the property and disposed of the same under and by virtue of a rate bill and warrant for the collection of a certain tax assessed against the plaintiff on his list for his poll and personal property for the year 1854, in pursuance of a vote of said school district at a legal meeting held on the 17th of January, 1855. The facts in the case are agreed upon by the parties.

It is agreed that the plaintiff removed from said district, with his family and effects, to Winchester, New Hampshire, on the 28th of December, 1854, and was not an inhabitant of the district at the time said tax was voted, or at any subsequent time but was an inhabitant of the district on the first day of April preceding, when the list was taken, and no question is made but that the plaintiff was properly listed as an inhabitant of the district for the year 1854. Three days before the plaintiff's removal from the district, the school house therein was destroyed by fire, and on the 17th of January following, the district, at a legal meeting duly warned for that purpose, voted "to raise a sum not to exceed two hundred and fifty dollars, to defray the expenses of building and furnishing a school house" in said district, and, during the summer of 1855 a school house was built and accepted by the district. The tax in question was assessed pursuant to this vote, and the plaintiff claims that it was illegally assessed, as against him, for various reasons.

I. It appears from the agreed statement of facts in this case, that the plaintiff had a list in the town of Dover for his poll and

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personal property in the year 1854, which was by the listers of said town designated or set in the grand list of said town for that year, as being in said school district No. 5 ; and no question is made as to the propriety or regularity of this designation or setting of the plaintiff's list for that year. It is clear that the tax authorized by the vote of 17th January, 1855, was intended to be assessed on the list of the year 1854, and it could properly be assessed on that list only ; for that list was then in force, and the inhabitants of the school district could not, at the time, under the provisions of the act of 1851 as amended by the act of 1854, (Acts of 1851, No. 40 ; Acts of 1854, No. 66) vote a tax for any purpose on any other list then either past or future.

II. The plaintiff claims that although he was an inhabitant of the district on the first day of the preceding April, and was properly listed therein in the list of the year 1854 for his poll and personal property, yet, as he removed from the State before the tax was voted, he was not liable, after such removal, to be taxed in that district on that list. It was held by this court in the case of *Woodward v. French*, 31 Vt. 337, that the reasonable construction of the existing statutes (Comp. Stat., p. 457, sec. 35, 36, and the acts of 1851 and 1854, above cited,) was that the list as taken on the first day of April should be a permanent list for each school district for the year, that each district might know its resources or basis of taxation in advance, and that a person who had been properly listed in a school district, still remained subject to taxation therein, upon such list, while it remained in force, even though he had subsequently removed from the district. That case is decisive against the plaintiff upon the point now under consideration ; and the liability of the plaintiff to taxation in that school district on the list of 1854 must be regarded as not being affected by his subsequent removal from the district while that list remained in force as a basis of taxation.

III. The tax in question was assessed by the prudential committee on the 10th of December, 1855, under the said vote of the district, at the district meeting held on the 17th of January preceding, and it is urged by the plaintiff that as it appeared that the choice of school district officers in said district was made at an annual meeting held on the 15th of October, 1855, and as the time

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for holding the annual meeting in said district was subsequently changed, agreeably to a vote of the district, so that the annual meeting of said district in the year 1856 was held on the 4th day of April in that year, (that time being near the commencement of the school year,) the acts of the prudential committee and collector of taxes after the 15th day of October, 1856, were irregular and void, notwithstanding the persons elected to the said offices respectively at the annual meeting held on the 15th of October, 1855, were re-elected to the same offices, respectively, by said district at its said meeting held on the 4th of April, 1856. It appears from the records of said district that the defendant was elected to the office of collector of taxes for the district, at both meetings, and that no other meeting for the choice of district officers was held in the district in the year 1856, except the said meeting last named. If it were conceded that the proceedings of that meeting were wholly irregular and void, still, no question being made respecting the legality of the proceedings of the annual meeting held on the 15th of October, 1855, as above mentioned, at which the same persons were elected to the same offices of prudential committee and collector, respectively, and the persons so elected being authorized by the statute (Comp. Stat., p. 146, sec. 25,) to hold their offices "for one year, and until others shall be chosen," it follows that at the time of the assessment of this tax in December, 1855, and also at the time of its delivery to the defendant as collector for collection, on the 12th of November, 1856, the persons then acting as prudential committee and collector of taxes in said district were entitled to act as such officers respectively, under their respective elections at the annual meeting of said district on the 15th of October, 1855, as aforesaid, even though their subsequent election to the same offices at the said district meeting held on the 4th of April, 1856, should be treated as being wholly void.

IV. It is urged on the part of the plaintiff that the warrant for the collection of this tax was void because it did not specify any "limited time" within which the tax was to be collected and paid over to the prudential committee, agreeably to the provisions of the statute. (See Comp. Stat., p. 149, sec. 41 and 42,—p. 464, sec. 8,—and p. 616, form 23.) The warrant, in all other respects, appears to be regular and correct in form, and no other

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defect in it, either of substance or of form, is suggested. In this respect, it might, as between the collector and the district, be regarded as informal and defective. But we regard the limitation in the warrant of the time within which the tax, when collected, is to be paid over by the collector to the prudential committee, as only affecting the duty of the collector to the district, and not as affecting any right or privilege of the person taxed. If any limited time for the collection and payment of the tax by the collector to the prudential committee had been specified in the warrant, the collection of the tax might have been enforced against the tax payer without any regard to the time thus limited. In this view, the omission to limit in the warrant the time within which the tax is to be collected and paid over by the collector to the prudential committee, ought not to be regarded as a defect which the person taxed is entitled to take advantage of, when the tax itself has been legally voted and assessed; and we think that this warrant conferred sufficient legal authority upon the collector to levy and collect the tax in question.

V. The warrant for the collection of this tax was attached to three tax bills which are connected together in a small book and separately certified. It requires the collector "to collect of the several persons named in the *lists* herewith committed to you the sums of money annexed to the name of each person respectively, and pay the same to the prudential committee of said district." The collector indorsed on the book containing said tax bills a memorandum as follows, viz: "Nov. 12th, 1856, Received of James Lyman and M. P. Cooper, prudential committee in district No. 5, one tax bill for collection," and subscribed the said memorandum. As it is made the duty of a collector of a school district tax (Com. Stat., p. 149, sec. 42,) to proceed in levying and collecting the tax in the same manner as is provided by law for collectors in collecting town taxes, and as it is made the duty of the constable on receiving a tax bill to indorse thereon the true date when he received the same, (Comp. Stat., p. 464, sec. 9,) the plaintiff insists that the indorsement made by the collector as aforesaid is by its terms applicable to only one tax bill; and as it does not specify to which of the three tax bills it was intended to be applicable, it ought not, on account of its uncertainty, to be

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regarded as being applicable to either. By reference to the statement of facts agreed on in this case, we find that "the persons assessed in this tax bill generally paid their taxes to the prudential committee, but the plaintiff and some others neglecting to pay, said tax bill, with a warrant attached thereto, was delivered to the defendant, together with two other tax bills, on the 12th of November, 1856," and that "all the proceedings of the defendant subsequent to receiving said rate bill and warrant were regular." If we regarded the omission by the collector to make an indorsement on the tax bill of the true date when he received the same, as being essential to the legality of his proceedings in collecting the tax (a question which we do not find it necessary to consider) we should have no difficulty, on the facts stated, in connection with the appearance of the original tax bills, (which are before us as a part of the case,) in referring the indorsement made by the collector as above mentioned, to the tax bill in question.

Our conclusion upon the whole case is, that the justification by the defendant of the trespass complained of, is complete, and that the plaintiff is not entitled to recover. The judgment of the county court in favor of the plaintiff is therefore reversed, and judgment is rendered, on the agreement of the parties, in favor of the defendant.

THE PROBATE COURT, E. G. STACY AND WIFE, *prosecutors*, v.
STEPHEN NILES AND JOSEPH STEEN.

Probate court. Administrator's bond. Husband and wife. Trustee process. Administrator. Settlement of estates.

It is not essential to the maintenance of a suit upon a bond taken to the probate court, that a copy of the bond, and the certificate of leave from the probate court to prosecute it, should be filed in the county court at the same

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time when the writ is returned there.* The county court may, in their discretion, allow them to be filed at any time during the first term, and the exercise of their discretion in this respect is conclusive.

A distributive share in the estate of a deceased person, belonging to a married woman, cannot be attached by the trustee process in a suit against the husband before a decree of distribution, nor until the latter has reduced it to possession.

The defendant, being administrator on the estate of a deceased person, a distributive share of which belonged to a married woman, and was still in his hands, was before any decree of distribution had been made, summoned, as such administrator, as trustee of her husband; *Held*, that his omission to appear and make disclosure in the trustee process that no decree of distribution had been made, and thus suffering himself to be adjudged chargeable as trustee by default, was negligence, and that the payment by him to the creditor of the amount of her distributive share upon a judgment so rendered against him, would not protect him from an action by the husband and wife upon his administrator's bond, for not paying over her distributive share.

DEBT upon a bond given to the probate court by the defendant Niles, as administrator of the estate of Ezra Gleason, and executed by the defendant Steen as surety. The writ was made returnable at the April Term, 1859, but at the time of the return of the writ no copy of the bond given by the defendants was filed, nor any certificate from the probate court that permission had been granted by that court to prosecute the same.

For this reason, the defendants, at the same term, moved to dismiss the action, but it appeared that such copy and certificate had been filed after the motion to dismiss was made, and before hearing upon it, and therefore the county court, REDFIELD, Ch. J., presiding,—overruled the motion, to which the defendants excepted.

The breach assigned in the declaration was in substance that the defendant Niles, as such administrator, had not paid to the prosecutors the sum of seventy-nine dollars and twenty-seven cents, upon a decree of distribution ordered to be paid to Clarissa Stacy, wife of E. G. Stacy, as her share of Gleason's estate.

The defendants' pleas set forth in substance that before the order of distribution was made, a suit was brought before a justice of the peace, by way of the trustee process, in favor of one

* See Comp. Stat., chap. LIX, sec. 2, p. 374.

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Brown against E. G. Stacy, in which the defendant Niles, as administrator of the estate of Gleason, was summoned as trustee, in which suit judgment was rendered against Stacy for one hundred and two dollars and seventy-eight cents, and against Niles as such administrator, as trustee, for the same sum; that execution was issued thereon against Niles and placed in an officer's hands for collection; that he had paid thereon to the officer the sum of seventy-nine dollars and twenty-seven cents.

The plaintiff replied that Niles did not appear before the justice of the peace before whom such suit was returnable, and make disclosure of the goods, chattels, rights and credits of the defendant E. G. Stacy, which he, as administrator of Gleason's estate, had in his hands, and that he, of his own wrong, voluntarily permitted such judgment to be rendered against him, as such administrator.

To this replication the defendants demurred.

The county court, at the September Term, 1859,—REDFIELD, Ch. J., presiding,—held the replication sufficient, and rendered judgment for the plaintiffs for the amount of Mrs. Stacy's distributive share in Gleason's estate, with interest from the time of the commencement of this suit, to which the defendants excepted.

E. Kirkland, for the defendants.

Bradley & Kellogg, for the plaintiffs.

ALDIS, J. I. The provision in the statute (chap. 59, sec. 2,) that the applicant shall file in the county court, at the time of the return of the writ, a copy of the bond and the certificate furnished by the probate court, is intended as a means of preserving in the county court the proof of a compliance with the preliminary requisites for the instituting of the suit. From the nature of the act required to be done, it is not vital to the suit that the time should be precisely complied with. The rights of the parties in no way depend upon the *time* of filing the bond and certificate, and this part of this provision must be considered as merely directory.

Executors and administrators are required by statute, before

entering upon their trust, and before letters testamentary or of administration are issued to them, to give bonds; yet their acts done before giving bonds are held valid, and the statute is regarded as being merely directory; *Heirs of Clark v. Tabor*, 22 Vt. 595.

The right to institute the suit arises when the probate court grants the permission, not when the proof of it is filed in court. Hence, leave to file the certificate, if out of time, was permissible in the discretion of the county court, and their discretion on the point was final.

The statute requires that copies of appeal from a justice of the peace should be certified by the justice. In a case decided at the last term at Rutland,* it was held that where the copies were not signed or certified by the justice, and a motion to dismiss was interposed, the court could continue the case to the next term for the purpose of enabling the party to perfect his copies, and the copies being perfected at the next term, that they properly overruled the motion.

II. The choses in action of the wife, while they remain in action, and have not been reduced to possession by the husband, are not the property of the husband. The share of the wife in her father's estate, while in the hands of the administrator, was her property, and not her husband's. There could have been no reduction of it to the possession of the husband before an order of distribution, and while in fact in the possession and under the legal control of the administrator. Hence it could not be subject to attachment by the trustee process for debts due from the husband.

There have been two decisions during the last year substantially involving this decision, one in Orange county and one in Washington county last November, in which the opinion was given by Judge PIERPOINT, where it was held that the property of the wife, until actually reduced to possession by the husband, is not liable to be taken by trustee process for his debts.

Here, till decree of distribution, the husband *could* have no action against the administrator. After the decree his creditors could not take the share of the wife till the husband had taken it

* See *Carruth v. Tighe*, ante. p. 626.

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into his legal possession and control, and this must be shown by some positive act of the husband. *Short v. Moore*, 10 Vt. 449, is directly in point to show that the distributive share of the wife is a mere chose in action.

The case of *Parks & Co. v. Cushman*, 9 Vt. 320, was where chattels and goods were in the hands of the administrator after a decree of distribution.

III. It is urged that the judgment of the justice that the trustee was liable, must protect the defendants. We think otherwise. First, it was the duty of the administrator to have disclosed the facts as to the wife's interest as heir, and if he had stated that there was no decree of distribution, and that the estate was in his hands, he could not have been held liable as trustee. His omission to do this, and suffering a default, was negligence on his part, and a judgment so obtained cannot protect him. Secondly, upon the plea and replication it only appears that he was summoned as administrator of the estate of Ezra Gleason, to disclose the goods, chattels, etc., which he had belonging to E. G. Stacy, the husband. He suffered a default. He might well do so if, as administrator, he had property or credits belonging to the husband, and this may have been so without in any way involving the wife's share in the estate. The estate may have been indebted to the husband wholly independent of the wife's interest as heir. Hence, the judgment that the administrator was liable as trustee, does not imply that the liability arose from his having in his hands funds belonging to the wife. The presumption of the law would be, that the liability arose from debts due on property belonging to the husband absolutely, and in his own right.

The judgment is affirmed.

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JOSEPH MASON v. GUSTIN HUTCHINS & CO.

*Parent and Child. Infant. Estoppel. Justice of the Peace.
Jurisdiction. Book Account.*

An agreement between father and son, by which the former agrees to relinquish his right to the services of the latter during his minority, for a certain sum per annum, reserving a claim upon his wages to that amount, and the right to treat the agreement as void in case that sum is not paid, and also to have the care of the son, and the control of his affairs during his minority, so far as to see that he gets his pay from those for whom he works, and that his wages are kept for his use and benefit, is not such an agreement of emancipation as divests the father of his right to sue and collect pay for his son's services.

A publication by a parent of a notice of the emancipation of his son, more liberal to the latter than the actual agreement between them, will not, as against one who has no knowledge of such publication, estop the father from insisting on such right to his son's wages as the contract between them actually gives.

Neither will the false statement, made under such circumstances, by the son to his employer, that he has been emancipated by his father, cut off the father's right to his wages, if the employer does not do or neglect to do something on the faith of such statement.

If in an action of book account, appealed from the judgment of a justice of the peace, the debit side of the plaintiff's book, and of his account as presented before the auditor, is less than one hundred dollars, the jurisdiction of the court is not defeated by the fact that the auditor adopts such a mode of stating the account, as swells the debit side of the plaintiff's account to more than one hundred dollars:

BOOK ACCOUNT. The action was originally brought before a justice of the peace, from whose judgment it was appealed. The plaintiff's account, was for the labor of his minor son, Albert, and the use of his horse and harness in the defendant's service, and the debit side of his account as presented before the auditor, was less than one hundred dollars.

The auditor reported that in November, 1855, the plaintiff entered into a written contract with his son, Albert, in the following words.

"Know all men by these presents, that I, Joseph Mason, of Newfane, in the county of Windham and State of Vermont, has

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sold his son, Albert Mason, his time till he is one and twenty years old, for twenty-five dollars a year, to be paid yearly till he is of age. If said Albert Mason fulfills his bargain to said Joseph Mason, I shall claim no more of his wages than the twenty-five dollars a year, otherwise the bargain is to be null and void.

He agrees to be of no expense to me from the date of this contract. And said Joseph Mason is to see that he has his wages from the men he works for, and see that they are kept for his use and benefit, all but twenty-five dollars a year. Said Albert Mason is to be in the care of Joseph Mason, his father, till he is one and twenty years old.

JOSEPH MASON."

November 21, 1855.

Immediately after the execution of this contract, the plaintiff caused to be published the following notice for three weeks successively, in the Vermont Phoenix, a newspaper published at Brattleboro, in the same county in which the plaintiff and defendants resided.

"NOTICE.—I have sold my son, Albert Mason, his time until he is of age. Therefore, I shall pay no debts of his contracting, nor claim any of his wages, except what we have agreed on.

JOSEPH MASON."

Newfane, November 20th, 1855.

It did not appear that either of the defendants ever saw this notice, or had any knowledge of the existence of the contract of emancipation above set forth, but while Albert Mason was in their employment, as afterwards stated, he told one of them that he "had bought his time of his father and was his own man."

This contract between Albert and his father was not rescinded; but Albert did not comply with it by paying the twenty-five dollars per year to his father. After the date of this contract, and before he went into the defendants' employment, Albert labored for other persons and collected and used his wages for the purchase of various articles of personal property other than clothing. These purchases were generally known to the plaintiff, and were consented to by him, and in speaking of the property so purchased, both the plaintiff and Albert spoke of it as belonging to Albert.

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In May, 1858, Albert then being about eighteen years old, with the plaintiff's consent commenced working for the defendants as a peddler, using in that business the plaintiff's horse and harness. He continued in the defendants' employment as a peddler, until November, 1858, for which service and the use of the horse and harness of the plaintiff, the auditor found that the amount charged by the plaintiff, and being the only item of his account, was a reasonable compensation upon the close of Albert's employment by the defendants, he and they undertook to make a settlement, and finally did make what the defendants understood to be a settlement, for Albert's labor for them and for the use of the horse and harness, and Albert then executed a receipt in full of all demands. The defendants at that time claimed that, upon a settlement of all their accounts with Albert, both that relating to his service, and also that connected with certain other transactions between them, he was indebted to them about forty dollars, and for the purpose of paying this balance, he executed to them a bill of sale of a watch which he had purchased from his earnings previous to going into their employment. Albert had no authority from the plaintiff to settle with them for his wages, or to sell the watch, unless such authority is to be implied from the facts already stated.

The defendants at the time of this alleged settlement credited Albert Mason, with whom alone the account for his services was kept by him, upon their books with forty dollars for this watch, that being the amount agreed upon as its value by them and Albert.

The auditor in reporting the plaintiff's account, allowed him for Albert's work for the defendants as claimed in the plaintiff's account. He also allowed to the plaintiff the item of forty dollars for the watch, which in addition to the items originally presented by the plaintiff, made the aggregate of the debit side of his account more than one hundred dollars. The auditor also allowed sundry items of the defendant's account, so that the balance found due by him, from the defendants to the plaintiff, was twenty-four dollars and thirty-one cents.

Upon this report, the county court at the September Term, 1859,—REDFIELD, Ch. J., presiding—rendered judgment for the

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plaintiff for the balance reported by the auditor, to which the defendants excepted.

Butler & Wheeler for the defendants.

Bradley & Kellogg and *A. Stoddard* for the plaintiffs.

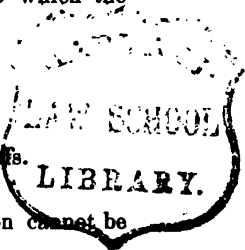
PIERPOINT, J. It is first objected, that this action cannot be maintained in the name of the present plaintiff.

It appears that on the 21st of November, 1855, and before the accruing of the accounts which this suit is brought to adjust, the plaintiff and his son, Albert Mason, then a minor, entered into an agreement by which the plaintiff was to relinquish his right to the services of his said son, during his minority, for the sum of twenty-five dollars per year, reserving a claim upon his wages to that amount, and the right to treat the whole as void in case the twenty-five dollars per year was not paid. Also reserving his right to the care of his son during his minority, and also the control of his affairs, so far as to see that he got his pay from those for whom he worked, and that his wages were kept for his use and benefit.

This we think cannot be called a deed of emancipation. The father does not surrender the control of the person of his son, or of his wages, but expressly reserves the right to collect his wages, and to retain them for his use. It is only an agreement on the part of the father that he will give his son, when he comes of age, the whole avails of his labors during his minority, except twenty-five dollars per year, and what he shall require for his expenses, thus offering an inducement to his son to be diligent, faithful and economical, at the same time reserving to himself the right to control his son and his affairs, so far as to see that he is not led astray, imposed upon, or cheated by those for whom he labored.

We think there is nothing in the terms of this contract that divests the plaintiff of his right to sue for and collect the pay for his son's services.

The notice published in the Vermont Phoenix can have no effect upon this case. So far as that notice is at variance with



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the agreement, the plaintiff would be bound by it as between him, and any person who had knowledge of it, and had acted upon the faith of it. The publication itself gives notice of the existence of an agreement between the father and son, on the subject of wages, so that any person acting upon it, would be bound by the terms of that agreement if they neglected to make enquiry in regard to it. The case, however, finds expressly that the defendants had no knowledge of the publication.

It does appear that the son, once after the agreement was entered into, and while he was at work for the defendants, told them that he had bought his time of his father and was his own man, but did not tell them what the terms of agreement were. There is nothing in the case tending to show that the defendants did or neglected to do anything on the faith of that communication, or were in any manner affected by it. So that this fact can have no weight in this case.

The defendants' second objection is, that the plaintiff's account exceeded one hundred dollars, so that a justice of the peace had no jurisdiction of it.

As the accounts are stated by the auditor, the plaintiff's account is made to exceed one hundred dollars; but his account as he presented it, and claimed it, did not. His account as it stood upon his books did not amount to that sum, and it does not appear that up to the time of the trial before the auditor, he had any knowledge of the transaction between his son and the defendants, out of which the credit for the watch arose. The watch did not necessarily constitute any part of the plaintiff's claim against the defendants. His claim against the defendants was for his son's services and the use of the horse and harness. In answer to this claim, the defendants introduced their account against the son, a part of which related to transactions connected with the contract for service, and a part not. Upon this account was a credit of forty dollars for the watch received of the son in part payment of the account. No objection was made to the adjustment of this account, in this action, and the auditor proceeded to adjust it. If in adjusting the accounts the auditor had adopted a different method of stating the accounts, he would have avoided the appearance of a conflict of jurisdiction. If after

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ascertaining the amount due for the services and the use of the horse and wagon, for which the plaintiff was entitled to recover, he had adjusted the accounts between the defendants and the son which were presented by them, and after ascertaining the balance due them on that account, he had deducted it from the plaintiff's account, the result would have been the same, and the process, by which he arrived at it, more in accordance with the law and the facts of the case. The manner of stating the account, by the auditor, cannot affect the jurisdiction. The whole facts as reported by the auditor show a case clearly within the jurisdiction of a justice.

The fact that the son attempted to settle with the defendants, cannot avail them. The son being a minor at the time, could not make a settlement that would be binding upon himself, or his father. No agreement between the son and his father, of the character claimed in this case, could make any difference in this respect.

Judgment of the county court affirmed.

CALVIN DOWNS AND FRANKLIN DAVIS v. ELIJAH F. REED.

New trial. Justice of the peace. Appeal.

The fact that an officer in serving a justice writ, with an *ad damnum* not exceeding ten dollars, delivers to the defendant a copy of the writ with the *ad damnum* stated at more than that sum, does not render the suit appealable; nor does the fact that in such a case the defendant appeared, and a judgment was rendered against him under the supposition on his part that he could appeal therefrom, make a case within the power of the county court to set aside the justice's judgment.

The exercise of the power of the county court to set aside the judgment of a justice of the peace in cases within the purview of sec. 8, chap. XXXVI, Comp. Stat., is entirely within the discretion of the court. No error, therefore, can be predicated upon the court's refusal to set aside such a judgment, unless it appear that such refusal was put upon some other ground than the exercise of the discretion of the court upon the facts presented.

Downs et al. v. Reed.

PETITION, under sec. 8, chap. XXXVI, Comp. Stat. p. 281, to set aside the judgment of a justice of the peace against the complainants in favor of the defendant.

The petition set forth that the writ in the action before the justice demanded in damages ten dollars; that it was served by an officer by delivering to each of the complainants what he certified to be a true copy of the writ, but that in fact the *ad damnum* in the copies was stated at forty, instead of ten dollars; that on the return day of the writ, the complainant Downs was sick and could not attend; that Davis attended with counsel who advised him that, owing to the statement of the *ad damnum* at forty dollars in the copies of the writ, the cause was appealable by himself and Downs; that at the hearing on the return day of the cause the justice directed Reed's attorney to read the writ, and that he commenced doing so, but was stopped by the complainants' counsel, who said it was unnecessary to do so, as the declaration was right; that the cause was then tried before the justice, certain witnesses were examined on the part of Reed, and a judgment rendered for Reed, within two hours after which Davis, in behalf of himself and Downs, applied in due form of law for an appeal from the judgment, which the justice refused to allow, on the ground that the *ad damnum* in the writ did not exceed ten dollars.

Upon the facts set forth in the petition, the county court, at the September Term, 1859, — REDFIELD, Ch. J., presiding, — refused to grant the petition, and dismissed the same with costs to the defendant, to which the petitioners excepted.

— — — — —, for the petitioners.

Davenport & Haskins, for the defendant.

BARRETT, J. The petition in this case was brought to the county court under sec. 8, chap. 36, of the Compiled Statutes. It shows that the suit before the justice was not *defaulted*, so there could have been no denial of a hearing on the assessment of damages. It further shows that the suit was not appealable, and so the party could not have been prevented from entering an appeal. It shows, therefore a case not within the provisions of

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the statute. The authority of the county court in respect to such a petition is only such as is conferred by the statute. It is not an inherent, incidental power that may be assumed and exercised independently of the statutory provision. On this ground alone the county court was justified in dismissing the petition, and, as matter of strict law, was bound to do so.

But there is another view in which it would seem that the case is not the proper subject of revision in this court. The exceptions do not show that the county court dismissed the petition on account of any supposed lack of authority to entertain it. They state that "the court, upon the facts set forth in the petition, and upon the statement above agreed on, refused to grant the appeal prayed for by the petitioners, but dismissed the same," etc.

The statute places the granting or denying of the prayer of such a petition entirely within the *discretion* of the county court. For aught that appears, the county court dismissed the petition in the exercise of that discretion, upon the facts set forth, irrespective of any question as to the authority of the court to entertain it. If so, then the decision of that court is not revisable here, as is settled by all the cases and the uniform practice upon the subject. The exceptions must show, affirmatively, error in matter of law, in order to give this court the right to reverse the judgment of the county court. If, therefore, it were to be assumed that the petition presents a case within the authority of the court, in order for this court to predicate error in the judgment dismissing the petition, it should appear in the exceptions that the decision was made upon the ground that the county court had not authority in law to entertain it.

Upon either of the foregoing views of the case we should regard it our duty to affirm the judgment. Yet, as the argument embraced the consideration of the question whether the case presented called for, or would justify, the granting of the prayer of the petition, if it was before the court merely as a subject for the exercise of discretion, it may not be improper to add that we agree in the opinion that the petitioner was not deprived of his day in court, in the sense of having been deprived of a trial by the justice, by the fraud, accident or mistake of anybody, unless it may be the mistake of the party himself in not going on with

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the trial at the time set, or asking for a continuance till Downs should have become able to attend, or applying to the justice on the day of the court, after it was found that the suit was not appealable, to strike off the entry of judgment, and let the case stand continued till Downs should have got able to attend and testify on the trial. It is not to be assumed that the justice would have wrongfully or unjustly denied such an application if it had been properly made to him. And we think before the party should be permitted to avail himself of the dernier remedy of petition to the county court under the statute, he should show, at least, that he had been denied reasonable and just relief by the justice, upon proper application made to him in that behalf. We are unable to discover any error in the judgment of the county court, even if it be regarded merely as the exercise of judicial discretion.

The judgment is affirmed.

TABITHA COBLEIGH V. EZRA PIERCE, JR.

Debtor and Creditor. Composition of debts. Evidence. Waiver.

Where a composition agreement between a debtor and his creditors contains a provision that all the creditors shall become parties to it, if any of the creditors do not join in it, it is void as to all.

It seems that if the creditor, whose signature was not procured to the contract, held security for the whole of his debt, that fact would create no exception to the above rule.

Where the debtor falls to pay or secure to a creditor, who is the party to the agreement, the stipulated percentage of his debt within the time specified therefor in the contract, the creditor may avoid such contract or agreement and insist upon payment in full.

If a creditor signs the agreement as to a part only of his debt, (such part being set down therein as his whole debt,) and that only upon the private promise of the debtor to pay him the balance in full, and the debtor has actually paid him this balance before settling with another creditor who is a party to the composition agreement, the latter would be justified in refusing to comply with the agreement, and evidence to prove these facts should be admitted.

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If a creditor unqualifiedly surrenders the promissory note which he holds for his debt, and accepts the percentage of it stipulated in the composition agreement, after the expiration of the time limited therein for its payment by the debtor, or with knowledge that all the creditors have not joined in the contract as provided by its terms, or that one of the creditors had signed it as to a part only of his debt, under such circumstances as to amount to a fraud on the other creditors who are parties to it, such surrender and acceptance will operate as a waiver of the right of the creditor, so receiving the stipulated portion of his debt, to avoid the agreement on either of those grounds respectively, and he cannot afterwards avail himself of that right for any purpose.

The plaintiff's evidence tended to show that when she, being one of the creditors and a party to the composition agreement, received from the debtor an amount of money equal to the stipulated percentage of her debt, and delivered to him the promissory note evidencing the debt, she declined to surrender it except upon a promise made by the debtor to pay or secure the balance of the note in full, which promise he accordingly made. *Held*, that this evidence was admissible upon the question of waiver, and that it was a question of fact for the jury to determine, whether she had waived her right in the premises to refuse to carry out the composition agreement.

ASSUMPSIT. Plea, the general issue and trial by jury at the April Term, 1859,—REDFIELD, Ch. J., presiding.

The evidence on the part of the plaintiff tended to prove that on the 14th day of November, 1856, she held a promissory note against the defendant, upon which there was due at that time the sum of four hundred and eighty-one dollars and thirteen cents; that on that day the defendant desired to obtain the note, and promised the plaintiff in consideration that she would deliver it to him, to pay her thereupon the sum of one hundred and twenty dollars and twenty-eight cents in cash, and to pay or secure to her the balance, three hundred and sixty dollars and eighty-five cents within six months; that she received said sum of one hundred and twenty dollars and twenty-eight cents from the defendant and permitted him to take the note, and that at the expiration of the six months she called upon him to pay or secure to her the balance of the note, according to his promise, which he refused to do.

The defendant testified that on the 30th of September, 1856, he suffered loss by fire and thereupon became unable to pay his creditors in full; that on the 7th of October, 1856, with a view

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of compounding his debts, he procured the agreement hereinafter recited, to be signed by his creditors, including the plaintiff, and that within six months from the date of the agreement, he paid in money to each of his creditors who had signed it, including the plaintiff, the sum of twenty-five cents on the dollar of the amount of their respective debts.

The defendant admitted, upon cross-examination, that at the time the agreement is dated, he was indebted to the Rutland and Burlington railroad company in about the sum of twenty dollars for freight upon salt and other goods, which came a few days before the fire to their depot at Chester, where the salt was retained until the following June, but no other goods remained, and the company did not assert any lien upon the salt for the freight; that he recollected this debt at the time he procured the signatures to the agreement; that he did not request the railroad company to sign the agreement, and it was not signed by them; and that he had since paid this debt in full. He also testified that there were other creditors for some very small amounts, not in his mind at the time, who did not sign, and whom he did not request to sign, the agreement.

The defendant further testified that at the time of the fire he was indebted to one Burton, for goods bought of him, in a sum exceeding eight hundred dollars, besides a debt on book of about fifteen dollars; that the day after the fire he paid or secured to Burton about six hundred dollars thereof, and agreed to pay him the residue except two hundred dollars; that Burton signed the agreement above mentioned, and that at the time of his signing, on looking over their matters, they found that he owed Burton for goods the sum of two hundred and twenty-six dollars and fifty cents, besides the fifteen dollars on book, and that he then agreed to pay the fifteen dollars on book, and twenty-six dollars and fifty cents of the two hundred and twenty-six dollars and fifty cents, in full, and with that understanding Burton signed the agreement so far as related to two hundred dollars of the indebtedness, which sum was entered against his name therein; that he has since paid Burton twenty-five per cent. of the two hundred dollars, and the twenty-six dollars and fifty cents in full, and a part of the fifteen dollars on book, which last two sums were paid

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previous to the surrender to the defendant of his note by the plaintiff.

The plaintiff had no knowledge, either at the time she signed the agreement or when she received the one hundred and twenty dollars and twenty-eight cents before mentioned from the defendant, of the debt to the railroad company nor of the promise made by the defendant to Burton, nor the payment to him in accordance therewith, but some of the other creditors did know of this promise to Burton when they signed the agreement.

The defendant offered in evidence the agreement referred to above, which was as follows :

"The undersigned, creditors of Ezra Pierce, Jr., of South Windham, Vt., in consideration of his recent loss by fire, which renders him unable to pay the full amount due from him to his creditors, hereby agree to settle our several claims for the sum of twenty-five cents on the dollar, payable in six months from date with satisfactory security, which shall be in full release of all demands against him to date. Provided that all the creditors of said Pierce shall become parties to this obligation, and the same shall be settled within thirty days from date. Windham, October 7th, 1856."

The plaintiff objected to its reception upon the grounds that it was without consideration ; that it was not signed by all the defendant's creditors, and because of the agreement, fraudulent as to her, between the defendant and Burton, as to all that part of Burton's debt which exceeded the sum of two hundred dollars. But the court held it valid and operative as a composition agreement, and the plaintiff excepted.

The plaintiff then offered to prove that at the time Burton signed the agreement, and to induce him to sign it, the defendant promised to pay him the full amount of the two hundred dollars, above mentioned, and that Burton did thereupon sign the agreement, and that she, the plaintiff, had no knowledge of this fact when she signed the agreement, nor when she received the one hundred and twenty dollars and twenty-eight cents. To this the defendant objected, the court excluded it, and the plaintiff excepted.

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The plaintiff also offered to prove that when the defendant paid her the one hundred and twenty dollars and twenty-eight cents, she declined to deliver the note to him, and claimed to hold it for the residue of its amount ; that to induce her to surrender it he promised to pay her the balance of it, and she, relying upon this promise, delivered it to him to enable him, as he then proposed, to show it to his Boston creditors, and that he then tore his signature from the note. This was objected to by the defendant, excluded by the court, and the plaintiff excepted.

The court intimated to the counsel for the plaintiff how they would charge the jury, viz : that the agreement, if intended and understood by all the parties to it, and the plaintiff and defendant among them, as a composition and final settlement of all the defendant's debts, was a valid contract, and constituted a legal bar to the plaintiff's claim, after being carried into effect according to its terms ; and that the plaintiff, after having become a party to the paper, received her dividend under it and surrendered her note to the defendant, was bound by it, and that any promise of the defendant to the plaintiff, or to Burton, to pay the whole of their debts, in the manner stated above, would be a fraud upon the other signers if kept from their knowledge, and consequently no action could be maintained upon it ; that the omission of the railroad debt, under the circumstances, or of the amount due Burton, above the two hundred dollars, or of such trifling debts as were not in the defendant's memory at the time, would not invalidate the legal effect of the compromise, nor would any of the other testimony in the case have that effect.

Thereupon the plaintiff's counsel submitted to a verdict for the defendant, with leave to except to the foregoing decisions of the court, and to the foregoing as the charge of the court in the case.

Stoughton & Grant and P. T. Washburn, for the plaintiff.

Buller & Wheeler and A. Stoddard, for the defendant.

PIERPOINT, J. It appears from the bill of exceptions that the defendant entered into an agreement with his creditors, the plaintiff among the number, to the effect that the defendant would

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settle the claims of the several creditors at twenty-five cents on the dollar, payable in six months from the date of the agreement, with satisfactory security therefor, which the creditors agreed to accept in full of their claims, provided *all the creditors* should become parties to the obligation, and the same be settled within *thirty days* from said date. This agreement was in writing, dated October 7th, 1856, and signed by most of the creditors, the plaintiff being one.

It also appears that on the 14th of November, 1856, the defendant agreed to pay the plaintiff, and did then pay her, on her debt against the defendant, the sum of one hundred and twenty dollars and twenty-eight cents, being twenty-five cents on the dollar of the whole debt, and also agreed to pay or secure to her the balance due on her debt, if she would deliver to him the note she held against him for such debt, and that she received the said one hundred and twenty dollars and twenty-eight cents on said note, and permitted the defendant to take the said note. The defendant has not paid the balance of said note, and the present action is brought to recover the remainder.

The plaintiff claims that she is not bound by the agreement entered into on the 7th of October, on the ground that all the creditors of the defendant did not become parties to it, according to the express terms of it.

The case shows that the defendant was indebted to the Rutland & Burlington railroad company in about the sum of twenty dollars which he thought of at the time he procured the signatures of his other creditors, but that he did not request or procure the signature of said company. ~~Also~~ Also that he was indebted to other creditors for very small amounts, that were not in his mind at the time, and that such creditors did not sign the agreement.

The agreement is explicit in its terms, that *all* the creditors shall become parties to it, and it is upon that condition only, that it is to become binding upon those who do sign it. It is conceded that the railroad company was a creditor of the defendant, but it is said that the failure of the defendant to obtain the signature of the company cannot have the effect to invalidate the agreement, inasmuch as the company had a lien upon property of the defendant in their hands for the payment of this

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debt. On examining the minutes of the judge who presided at the trial below, and which are made a part of the case, it appears that the company had no lien for the security of a part of this debt, and did not assert a lien for the other part of it, so that this argument fails; but even if it were true that the company had a lien on the property for the whole debt, would that vary the case? They are none the less creditors for that, and are equally included in the *terms* of the agreement. The defendant, it is true, might have more difficulty in procuring their signature for that reason, but that is a risk he took upon himself when he made the contract. If he would have avoided such difficulty he should have made known the facts to his creditors, and inserted in his agreement an exception of such creditors as held security for their debts; in that case the other creditors would have had an opportunity to determine for themselves whether or not they would become parties to the arrangement. Possibly they might all have done so, but for this court to add so important an exception to the contract by construction, when the language used is so explicit and the agreement so free from all doubt and uncertainty, either on the face of it, or arising from any extraneous circumstances, would be carrying the doctrine of construction to a point where it would be difficult to sustain it by authority or sound reason, especially where there is no evidence tending to show that any one of the creditors, at the time they signed the agreement, knew of any such reason why such an exception should be made.

If, then, this contract is to be understood to mean what it says, what effect is the failure of the defendant to procure the signature of the company, to have upon the validity of this contract as between these parties?

The rule is well settled that where contracts of this character contain a stipulation that all the creditors shall become parties to it, if any of the creditors do not join in it, the contract is void as to all.

This is fully sustained by the authorities cited by the counsel for the plaintiff, and is recognized in the case of *Dauchy v. Goodrich*, 20 Vt. 127. This being so, we think the plaintiff had the right to refuse to carry out the agreement, and to insist upon the full amount due on the note.

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We think she had the right also to repudiate this agreement on the ground that the business was not settled, either by giving satisfactory security or for the payment within six months, or by paying the money within thirty days from the date of the agreement. This doctrine is recognized in *Spooner v. Whiston*, 17 E. C. L. 547.

We think also that the alleged transaction between the defendant and Burton, if true, as the plaintiff offered to prove, was such as fully to justify the plaintiff in refusing to carry out the arrangement. Burton's debt was two hundred and forty-one dollars and fifty cents; he signed the agreement only as to two hundred dollars of that debt, and this the plaintiff offered to show, he did only on the terms that the defendant would agree to pay him not only the forty-one dollars and fifty cents, but also the whole of the remaining two hundred dollars. Under this arrangement it is true that Burton could claim only the twenty-five per cent. on the two hundred dollars, and could not enforce the agreement to pay the balance in full, as such agreement was a fraud on the other creditors, and void. Still before the defendant attempted to arrange the matter with the plaintiff, as stated in the bill of exceptions, the defendant had in fact paid to Burton the whole of the forty-one dollars and fifty cents, so that he was receiving a much larger dividend on his debt than the other creditors. This fraud was thus consummated and would as fully justify the plaintiff in refusing to comply with the agreement as though the money for this balance had been paid to Burton in the first place, to induce him to sign the agreement.

The testimony offered tending to prove these facts should have been admitted.

But it is said, conceding all this to be so, and that the plaintiff had the right to treat the arrangement as no longer binding upon her, still she has not availed herself of this right, but has waived it, and received the stipulated portion of her debt, and surrendered the note.

That a creditor under such circumstances may waive this right, is conceded; if it is waived, the party cannot afterwards avail himself of it for any purpose. This is fully established in this State, in the case of *Dauchy v. Goodrich*, above referred to.

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The question then arises, did the plaintiff waive this right, which we have already seen she possessed. This would seem to be a question of fact to be determined by the jury, and one which the county court could not properly determine, except upon a conceded state of facts, and then only as a matter of law arising upon such facts. Indeed the county court did not pass upon this question. They put the case upon the ground that the testimony was not sufficient to show that the plaintiff had the right to avoid the agreement. Of course there was nothing to waive, and this question could not arise. We having taken a different view of the subject, and established her right, there seems to be no other ground that can be made available to defeat that right, except that of waiver. And unless we can see from the case as it is made up, that the undisputed facts are such as amount to a waiver, as a matter of law, the case must be remanded.

An unqualified acceptance of the money, and surrender of the note, after the expiration of the thirty days, would undoubtedly be a waiver of the right to object on that ground, as the transaction could not have taken place without her knowing that the agreement in this respect had not been complied with; and, if having this knowledge, she voluntarily executes the agreement on her part, she would be bound by it. So too, if she knew that the creditors had not all signed the agreement, or knew of the transaction between the defendant and Burton. But it is not quite obvious on what ground it can be claimed that she waived her right founded on the existence of these facts, unless she knew of them and the rights resulting from them. But the case shows that she had no knowledge of those facts. If it did appear that she had knowledge of the facts, it does not appear conclusively that when she received the money, and delivered the note to the defendant, she did it in pursuance of the agreement, intending to carry it out, and to waive all objection to it. But on the contrary, the plaintiff's evidence tended to prove that when she received the money, and delivered the note, it was upon an express agreement that the whole should be paid. Taking this, in connection with the offer of the plaintiff to show, that on payment of the money, she declined to deliver the note to the defendant, but claimed to hold it for the residue of its amount, and that she

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allowed him to take it only to show to his Boston creditors, and upon his express promise to pay her the balance, (which evidence is clearly admissible upon this question of waiver,) and it is perfectly clear that the subject is one for the determination of the jury alone.

Judgment reversed and case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR,
AT THE
FEBRUARY TERM, 1860.

PRESENT:

HON. LUKE P. POLAND,	} ASSISTANT JUDGES.
HON. JOHN PIERPOINT,	
HON. JAMES BARRETT,	
HON. LOYAL C. KELLOGG,	

AUGUSTUS FISK AND HERMAN C. FISHER v. WILLIAM C.
BRACKETT.

Action. Insolvent laws. Chose in action. Conflict of laws.

The assignee, under the insolvent laws of another State, of a non-negotiable chose in action, cannot maintain an action upon it in this State in his own name, notwithstanding the laws of such State expressly provide that he may do so, and though all the parties reside there.

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ASSUMPSIT for goods sold and delivered. The plaintiffs were the assignees, under the insolvent laws of Massachusetts, of Arthur Stowell, who was a citizen of that State, and who, prior to his insolvency, sold the goods in question, in Massachusetts, to the defendant, who then, and at the time of the appointment of the plaintiffs as Stowell's assignees, was also resident there.

The facts that Stowell was declared an insolvent under the laws of Massachusetts, that the plaintiffs were duly appointed his assignees under such laws, and that all his effects, including this claim against the defendant, were assigned to them by the commissioner of insolvency in Massachusetts, were all duly proved.

The plaintiffs also proved that by the laws of Massachusetts the assignees of insolvents are expressly empowered to maintain actions in their own name upon all the *choses in action* of the insolvent.

The defendant claimed that the plaintiffs could not maintain this action in their own name, but the county court, at the November adjourned Term, — REDFIELD, Ch. J., presiding, — held otherwise, and rendered judgment for the plaintiffs for the amount of their claim, to which the defendant excepted.

Washburn & Marsh, for the defendant.

E. Hutchinson, for the plaintiffs.

POLAND, J. There is no subject upon which greater conflict and confusion exists, both in the decisions of courts and among elementary writers, than upon the legal effect of an assignment under the bankrupt or insolvent laws of a country, upon the property of the bankrupt or insolvent in another jurisdiction. But in the present case it does not become necessary at all to enter into this extensive field of legal discussion, for at the time this debt was contracted the defendant and the insolvent were both residents of Massachusetts; the debt was contracted there, and all the parties continued to be residents of that State up to and after the time of the proceedings in insolvency, and the transfer of the effects of the insolvent to the plaintiffs under those pro-

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ceedings. No question is now made as to the regularity of those proceedings under the insolvency laws of Massachusetts, nor as to the sufficiency of the proof of them, upon the trial in the county court. The right of the several States to pass such laws, and thus divest the insolvent of all his property, and vest the same in the assignees, in cases properly within their jurisdiction, is now fully established, and is not questioned here. The plaintiffs, then, by virtue of these proceedings in Massachusetts, became entitled to this debt against the defendant, and to recover it for the purpose of distributing it with the other assets of the insolvent among his creditors. Nor is there any question made but that, as against the defendant, the plaintiffs have the right, in some form, in our courts, to a legal remedy to enforce collection of the debt. In Massachusetts, by force of their statute, the plaintiffs would be entitled to sue in their own names. This brings us to the single question presented by the case: can these plaintiffs maintain an action in our courts to recover this debt in their own names? An assignment of such a chose in action, not negotiable by the law merchant in this State, would not enable the assignee to sue in his own name, though his rights would be regarded and protected by our courts. Any legal proceedings to enforce payment of the debt must be in the name of the assignor, but the assignee would be allowed to control and manage the suit, and collect the judgment against any interference by the assignor. If, then, the plaintiffs can sue in their own names, it is wholly by force of the statute of Massachusetts. The plaintiffs' counsel does not claim that the laws of Massachusetts have any force, as such, beyond the territorial limits of that State, but insists that as the transfer of this debt to the plaintiffs was valid by the laws of that State, and as one of the incidents of that transfer was to give the plaintiffs a right to sue in their own names in that State, that the same legal effect should be given to it in this State. On the other hand, it is insisted by the defendant that this is not a matter pertaining to the right of the plaintiffs under the assignment, but relates wholly to the form of the remedy, and that though the courts of this State should regard the rights of the plaintiffs fully to recover this debt, still, that they should be required to pursue the forms of remedy provided

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by the laws of this State, and not those of the State of Massachusetts. The general rules laid down in the books and cases, as to what law is to govern in determining the validity, obligation, construction and effect of the contract, and what shall govern as to the form of the remedy to enforce it, are uniform; the *lex loci* regulates the former, and the *lex fori* the latter. The only difficulty arises in the application of the rules in determining to which class this question belongs. It appears to us that there is some impropriety in likening this transfer to a case of a transfer by contract between the parties, so as to bring it within this rule. The reason given why a contract between parties is to be construed by the law of the place where it is made, is, that the parties are presumed to have contracted in reference to it, and intended to be governed by it. But this transfer was not made by any consent of parties; it was by a proceeding wholly *in invitum*, and though legally valid and binding, it rests wholly upon the strength of legal enactment. In some of the numerous cases where the effect of bankrupt assignments have been discussed, it is said that such transfers, made by virtue of the laws of the State, have the presumed assent of the bankrupt, because he is a citizen of the State and owes obedience to its laws; but in many others of these cases any such presumption is denied. We deem it of no importance to examine this legal abstraction.

Does it follow that a transfer of a chose in action in our State, by the act and assent of the parties, is to have all the legal effects and incidents in every other State, that it might be entitled to where made? Suppose that in Massachusetts there should exist a law enabling the assignee of any chose in action to sue upon it in the courts of that State in his own name, would that authorize such assignee of a debt not negotiable by the laws of this State, to maintain an action upon it in our courts in his own name? It seems to us that it would not, any more than it would entitle him to adopt some particular form of action given by the laws of that State, but not known to our law. That the plaintiffs would be entitled to sue here in their own names for the recovery of property the title to which vested in them by the assignment, we do not doubt, for such would be the legal effect and legal remedy

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given by our law to the transfer of the title to personal property.

But it seems to us quite another thing to authorize them to sue in their own names upon a contract of the insolvent here, by virtue of the statute of Massachusetts. The distinction we think is plain and clear. The real owner of a note or bond, made to another, not negotiable, or not legally assigned, might maintain trover for the conversion of it, but if he wished to enforce payment by the maker or obligor, he must sue in the name of the payee or obligee. We have felt every inclination to get over this objection, if possible, for it is merely technical, but we are satisfied that, upon principle, the right to sue by the plaintiffs in their own names exists only by force of the statute of Massachusetts, and cannot be regarded as operative beyond the territorial force of the statute, and that in this State we can give no other force to the assignment than to any legal assignment of the same debt here, and that the remedy must be pursued here in the name of the assignor. The case of *Pickering v. Fisk*, 6 Vt. 102, seems fully to support this conclusion. That was an action upon a bond given by the defendant, as sheriff of the county of Grafton, New Hampshire, to the treasurer of the State, for the faithful and due execution of his office, and setting forth a breach of duty by the defendant, as sheriff, in not collecting and returning an execution in favor of one Moore. It was conceded that by the statutes of New Hampshire such an action could be sustained there, but it was held not to lie in this State. The whole subject is most ably examined and elucidated in the opinion given by PHELPS, J.

The very point here raised has often been before the courts in this country, and from the examination we have been able to give to it, we think the great balance of judicial opinion is adverse to the maintenance of such action in the name of the foreign assignee.

In *Orr et al. v. Amory*, 11 Mass. 25, it was decided that the assignees of an insolvent debtor in Pennsylvania, could not maintain an action in their own names against a debtor of the assignor in Massachusetts.

In *Bird et al. v. Caritat*, 2 Johns. 342, it was held that an action in the name of an English bankrupt was properly brought,

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instead of being brought in the name of his assignees. In the opinion given by KENT, Ch. J., it is said that the courts here will give effect to the title of the foreign assignees, but that the mode of proceeding must be governed by the law of the place where the suit is brought, and as the debt was not assignable at common law, nor by the law of New York, the assignees could not sue in their own names.

So in *Raymond v. Johnson*, 11 Johns. 488, the plaintiff had become an insolvent under the insolvent law of New Jersey, but it was held that this action in New York was properly brought in his name, and not in the name of his assignee.

The same doctrine is laid down in Merrick's estate, 5 W. & Sergt. 9, and incidentally stated in many other cases.

This whole subject is fully examined by Judge STORY in his *Conflict of Laws*, and all the authorities collected and examined. He says, sec. 565, "and this rule (that choses in action are not assignable) is applied to assignments of choses in action, made in foreign countries, although the assignee might be entitled to found an action thereon in such foreign country in his own name, in virtue of such assignment. For such have been thought to belong not so much to the right and merit of the claim as to the form of the remedy. Thus it has been held that a Scotch assignee of a bankrupt could not maintain a suit in his own name in England for a chose in action of the bankrupt, which was admitted to pass under the assignment. In America, contradictory decisions have been made upon the same point, some decisions affirming and others denying the right of the assignee to sue in his own name, though the weight of authority must now be admitted to be against the right." But by an examination of the cases cited by Judge STORY to this section, I do not find any case where it has been decided that such foreign assignee can maintain an action at law here in his own name.

It is said by judges in many of the cases, that our courts will respect the rights of the foreign assignee, and that he will be permitted to sue in our courts, &c., but generally all these *dicta* occur, where the general effect of such foreign assignment was under consideration, and whether the foreign assignee had here any rights under it, and not where any question arose as to the

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form in which his remedy must be pursued. Such generally are the cases which the industrious examination of the plaintiff's counsel has brought to our attention. We are not aware of any case in this country where the foreign assignee has been allowed to sustain an action at law in his own name on a non-assignable chose in action due the bankrupt. The only English case which seems to warrant such an action is *O'Callaghan v. Thomand*, 3 Taunt. 82, where it is said that the court held that the assignee of an Irish judgment, (which is assignable in Ireland) could maintain an action in his own name in England. On an examination of that case it does not appear very distinctly what was decided, though the court intimated such an opinion. But Judge STORY says of this case "that it seems to stand alone, and therefore can scarcely be thought unexceptionable in point of authority." He quotes *Folliott v. Ogden*, 1 H. Bl. 135, and *Wolf v. Oxholm*, 6 M. & S. 99, as opposed to it. The case of *Jeffrey v. McTaggart*, 6 M. & S. 126, the case of the Scotch assignee, seems directly opposed to it.

There are many other cases which support the same general view of what pertains to the remedy merely, and therefore governed by the law of the forum.

In New York it has been held that a note in form negotiable, executed in Connecticut, (by the law of which State such note could not be negotiated so as to entitle the assignee to sue in his own name there,) might be sued in the name of the endorsee in the courts of New York.

So in the same State it has been held that upon an instrument executed in Virginia, having a scroll in the place of a seal, and which by the law of Virginia is equivalent to a seal; the action must be brought upon it as a simple contract; *Warren v. Lynch*, 5 Johnson, 239.

A similar decision was made in New Hampshire; *Douglass v. Oldham*, 6 N. H. 150.

The same principle has been decided in Maryland; *Thrasher v. Everhart*, 3 Gill & Johns. 234.

The judgment below we regard therefore as erroneous, and the same is reversed and the case remanded.

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THE CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD COMPANY v. WILLIAM H. BAXTER.

Contract. Railroads. Ambiguity. Evidence. Practice. Agent. Jury.

A subscription for the stock of a railroad company, provided that the money so subscribed should be expended in the construction of the road from St. Johnsbury to Derby Line, and also that it should not be binding until the whole road from St. Johnsbury to Derby Line should be put under contract for grading. *Held*, that this was not merely a general description of the road, requiring the whole of it to be put under contract before the subscription was payable, but that it created an express condition to the validity of the subscription, that the road should be put under contract as far north as Derby Line.

Held, also, that the term *Derby Line*, in the absence of any evidence as to its meaning, except the subscription itself, and the fact that the charter fixed the northern terminus of the road in the north line of Derby, must be construed to mean the north line of Derby.

But, the defendant, having shown that the words *Derby Line*, in common usage, meant a village of that name in Derby, it was *held*, that it became a question of fact for the jury to decide, whether that expression in this contract, meant the north line of Derby, or the village named *Derby Line*.

In an action to recover the amount of the defendant's subscription for a portion of the plaintiff's capital stock, the plaintiff offered to prove that at a public meeting of the friends of the road, held in the neighborhood of the village of Derby Line, prior to the defendant's subscription, a form for the conditions of subscription was under discussion, in which the words "Derby Line Village" were used to signify the northern terminus, and that the word *Village* was stricken out therefrom, at the request of some one who argued and believed that the expression *Derby Line* would leave open the question of terminus to be subsequently fixed at any point in the north line of Derby; but the plaintiff did not offer to prove, and did not prove, that the defendant was present at, or ever aware of such meeting. *Held*, that the testimony was inadmissible, and that it was error to admit it, notwithstanding the court in their charge to the jury, instructed them that it was immaterial.

Held, also, that evidence was inadmissible to prove that the route adopted, which terminated in the north line of Derby, and not at Derby Line Village, was more feasible, and better for the company and the public, than any route leading to that village.

Held, also, that if the plaintiffs' agent, who obtained the defendant's subscription represented that the route, intended by the written condition, was one

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terminating at Derby Line Village, and the defendant subscribed in reliance upon such representation, the plaintiff was bound thereby, whether it was made fraudulently, or not.

ASSUMPSIT upon the defendant's subscription for twenty shares of the capital stock of the plaintiffs' company. Plea, the general issue and trial by jury, at the May Term, 1859,—REDFIELD, Ch. J., presiding.

On trial, the plaintiffs introduced in evidence their subscription book, showing that the defendant on the 24th of March, 1853, subscribed for twenty shares of the capital stock, and at the same time subscribed the following contract.

"Whereas, the Connecticut and Passumpsic Rivers Railroad Company propose to extend said Railroad from St. Johnsbury, via Barton, to Derby, if means can be obtained for that object; now, for the purpose of extending said railroad, we, the subscribers, agree to associate ourselves with the said company, and hereby promise and agree to pay to said company, the sum of one hundred dollars for each and every share set against our respective names, in installments of ten per cent. on each share, to be expended by the directors of said company in the extension and construction of said railroad from St. Johnsbury, via Barton, to Derby Line, provided that the undersigned shall not be obliged to pay any part of our subscriptions until the whole road from St. Johnsbury, via Barton, to Derby Line, shall be put under contract for grading, and that sixty days notice shall be given by the treasurer or directors of said company to us, for each and every installment required to be paid on the shares subscribed. And it is further understood, that the term of at least sixty days shall elapse between the periods that the different installments shall be called for, so that no installment shall be required within sixty days of the date of the requisition of the next preceeding installment."

The plaintiffs also proved that four assessments of ten dollars each upon each share had been laid upon the capital stock, and due notice thereof given, all of which were due before the commencement of this action, and that two of the assessments made against the defendant had not been paid.

The plaintiffs also introduced in evidence a written contract

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made October 27th, 1855, between them and one Balch, for the construction by the latter of the plaintiffs' railroad, north from St. Johnsbury to its termination on the Canada line, which contract provided that the location of the road from Barton to the Canada line should be determined by certain persons therein named. The plaintiffs offered to prove that those persons established such location upon the western route, so called, terminating in the town of Derby, upon the Canada line, three and one-third miles west of the village of "Derby Line," and that this route was better for the company and for the public than either the "middle" or the "eastern route," so called, both of which terminated in the village of Derby Line; and that the plaintiffs accordingly adopted the location by the *western route*. This evidence was objected to by the defendant, but was admitted by the court, to which the defendant excepted.

The plaintiffs then offered to prove, and under objections from the defendant were allowed to prove, by several witnesses, that they had ever understood the word, "Derby Line," when used in connection with the plaintiffs' railroad, to signify, the north line of the town of Derby. To the admission of this evidence the defendant also excepted.

It appeared upon cross-examination of these witnesses, and was virtually conceded by the plaintiffs, that the words "Derby Line," in their common use, in that vicinity, signified a village of that name in Derby, situated upon the Canada line, and that no other place bore that name.

The plaintiffs here rested their case, and the defendant insisted that upon this evidence the plaintiffs could not recover, as their proof had not shown, or tended to show, any performance by them, of the conditions of the defendant's contract, but on the contrary a failure, to put the road under contract for grading to "Derby Line." But the court held that it was a question for the jury to decide, what was the meaning of the words "Derby Line" in the defendant's contract, and that those words, in that connection, were *equivocal*, and admitted and required evidence *aliunde* as to their meaning. To this ruling of the court the defendant excepted.

The defendant then introduced testimony tending to show that in

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Derby and the vicinity of the place where the defendant's contract was made, the words "Derby Line" were universally used as meaning the village of that name, and that prior to his subscription the plaintiffs' company contemplated and held out to the public the adoption of a route through the village of Derby Line, and that they had never, before he subscribed, intended or proposed any other ; that the directors of the company, and the agent who obtained his subscription for the stock, represented to him that such route was to be the route of the road, and that he subscribed with such understanding, relying upon these representations and upon the words of the contract. It appeared that the charter of the road fixed its northern terminus as the Canada line, either in the town of Derby or Newport, but the defendant testified that he had no knowledge of the terms of the charter in this respect.

The plaintiffs then offered testimony tending to show that at a public meeting of the friends of the extension of the plaintiffs' road from St. Johnsbury, held at Stanstead, in Canada, only a mile or two from the village of Derby Line, prior to the defendant's subscription, a form for conditions of subscription was discussed, in which the words "Derby Line Village" were used to signify the northern terminus, and that the word "Village" was stricken out of such form, at the request of some one, who argued and believed that the words "Derby Line" would leave open the question of terminus to be subsequently fixed at any point on the north line of Derby.

It was not claimed by the plaintiffs that the defendant was present at, or knew of any of the sayings or doings at that meeting, and the testimony was objected to by the defendant, but was admitted by the court, subject to objection thereafter, to which admission the defendant excepted.

The defendant then insisted that there was no evidence in the case to go to the jury of any common or proper use of the words "Derby Line" in any other sense than as designating the village of that name, and none that the plaintiffs, or their agents, or the defendant ever used or understood the words in any other sense in connection with their railroad.

But the court held that the case upon this point was a proper

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one to be submitted to the jury, to which the defendant excepted.

The defendant requested the court to charge the jury that if the plaintiffs' agent who obtained the defendant's subscription, represented to him that the route intended by the contract signed by him, was the one terminating at the village, of Derby Line, and that the plaintiff signed the contract, relying upon such representation, the plaintiff was bound thereby, whether it was made fraudulently or not.

The court, among other things not excepted to, charged the jury that the mere fact that the road did not go where the defendant expected it would go when he subscribed, is not sufficient to avoid his subscription, unless the agent who took his subscription represented that the road would go by Derby Line Village, more strongly than he or the directors honestly believed would be the case; that if there was no fraud in this respect, and the words "Derby Line" used in the contract, did not, in the opinion of the jury, mean the village of that name, the corporation had the right, as against this defendant, to build their road to any point in the north line of Derby; that the change made in the subscription paper at the meeting at Stanstead, by striking out the word "village" was of no importance as evidence in this case unless such change was known to the defendant before he subscribed, and he acquiesced in it as altering the legal construction of the contract of subscription; and that if, after that word was struck out, the expression "Derby Line" really meant Derby Line village, the same as before, or if the defendant subscribed, understanding that to be its meaning, and the agent taking his subscription knew that such was his understanding, the legal import of the terms would, so far as the defendant was concerned, be controlled by, and be the same as such understanding.

To so much of the charge of the court as is above recited, the defendant excepted.

Peck & Colby for the defendant.

T. P. Redfield and *Washburn & Marsh* for the plaintiffs.

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PIERPOINT, J. This action is brought upon a contract entered into by the defendant with the plaintiffs, by which he subscribed and agreed to pay for, twenty shares of the capital stock of the plaintiffs' company. The contract contains the following condition: "Provided that the undersigned shall not be obliged to pay any part of our subscriptions, until the whole road from St. Johnsbury, via Barton, to Derby Line, shall be put under contract for grading."

It is insisted on the part of the plaintiffs, that this is not a condition requiring a contract for the grading of this road over, or terminating at, any precise locality, but is only a general description of the road referred to, and requiring that the whole should be put under contract before the subscribers should be called on for their subscriptions, without reference to any particular point of termination, as the one to which the company was to extend the road.

This view of the contract we think is not correct. It is quite obvious from the terms of the contract, that it was the intention of the subscribers to make it a condition on which their liability was to depend, not only that the whole road should be put under contract, but that such road should run from St. Johnsbury, by the way of Barton, to Derby Line. This is clearly indicated by what immediately precedes the proviso, where it is declared that the money subscribed, is "to be expended by the Directors of said company, in the extension and construction of said railroad from St. Johnsbury, via Barton, to Derby Line."

These provisions we think place the question beyond all controversy, that the northern terminus of this road must be at Derby Line, or there can be no compliance with the conditions contained in the defendant's contract.

The question then arises, has this condition been complied with? To determine this, we must first ascertain what point is referred to in the condition as the northern termination of the contemplated road; or, what point is indicated by the words "Derby Line" as used in this contract? The contract as reduced to writing, commences with a statement of the proposal of the company, to extend their road "from St. Johnsbury, via Barton, to Derby." Of the existence of these places as incorporated towns

within this State, courts will take judicial notice. The acts of our legislature chartering railroad companies are declared to be public acts, and of their existence, courts will also take judicial notice. Taking this contract in connection with these facts, which is all the court is supposed to know on the subject, in the absence of proof, and the conclusion would seem to be irresistible that when the parties in a subsequent part of the contract use the term *Derby Line*, as the point to which the grading of the road is to be contracted for, they refer to some one of the lines which constitute the boundaries of the town of *Derby*. The terms of the condition, strictly considered, would be complied with by putting the road under contract to the south line of the town, or that line of the town that should be first reached by the road in its course from *St. Johnsbury* onward, by the way of *Barton*. And if there was nothing to be considered but this clause of the contract itself, probably that would be its true construction. But when considered in connection with the charter of the company, which extends the road to the north line of *Derby*, and the words of the contract, "that the *whole road* from ' *St. Johnsbury*, via *Barton*, to *Derby Line*' shall be put under contract," we think the fair construction of the condition of the contract, when viewed in connection with these facts, is, that the road should be put under contract to the north line of the town of *Derby*. What knowledge the members of the court may possess individually, on the subject, is a matter of no importance. As a court, they can know only those facts that are proved, or those of which they are bound to take judicial notice. In this case they can have no knowledge of the existence of any place, that the parties could have referred to, as *Derby Line*, except the boundary line of the town. Of the existence of any village or other precise part known as *Derby Line*, to which the parties could have referred, the court cannot know until the fact is legitimately proved.

Upon the trial in the county court, all the evidence the plaintiffs were required to introduce to show that they had complied with the conditions of the contract was, that they had put the road "under contract for grading," from *St. Johnsbury*, via *Barton*, to the north line of the town of *Derby*.

If the defendant claims that the parties, in using these words

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in the contract, intended to refer, and did refer to another point, different from that of the north line of the town, he must first show that there is some other point, known by that name, to which the parties could with propriety have referred by those terms, and to which they did refer. By introducing testimony to show that a village situated on the north line of the town of Derby was universally known and called, whenever it was known at all, by the name of Derby Line, the defendant raises a doubt as to the true construction of the condition in this contract. When this fact is introduced into the case it becomes apparent that the words used can be applied with as much propriety to this village as to the town line, and in fact with more propriety, for when so applied no doubt is left as to the precise location referred to; but when applied to the town line, a doubt is still remaining as to *which* line of the town is referred to.

When this ambiguity is raised it becomes a question of fact to be settled by the jury, upon the evidence legally admissible for that purpose, and under proper instructions from the court.

It is insisted on the part of the defendant that the court erred in submitting the question to the jury, as to what the parties intended by the use of these words, inasmuch as the case shows that the defendant proved the fixed, invariable application of the words "Derby Line" to the village so named. But it must be borne in mind that those words became equivocal when the fact was established that the village was called by that name, and it then became a question of fact as to what the parties intended by them, whether the village or the line of the town, and it was upon this question that all the evidence, as to the application of those words to the *village* in Derby, and not to the town line, by the inhabitants in the vicinity, was admitted. The more full and perfect the proof, the greater the probability of satisfying the jury and obtaining a verdict, but no amount of testimony on the point, of this character, could have the effect to change this question of fact to one of law, so as to warrant the court in taking it from the jury and deciding it as a matter of law.

Indeed, all the evidence as to the general understanding of the meaning of this expression in the vicinity, has no direct application on the real question in issue; it bears only on the probabili-

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ties of the case, and if it had been proved, beyond all question, that prior to the making of this contract this expression had never been used with reference to the town line, it would not have been conclusive. The expression being a proper one to use in that connection, these parties may have used it in that sense in this contract for the first time. The question would still be open for the jury to say in what sense the parties *in fact* used it.

The county court evidently took this view of the case, and we think were entirely correct in so doing.

This conclusion disposes of a number of objections raised in the argument by the counsel for the defendant.

It is further urged that the county court erred in admitting evidence of the proceedings at a public meeting held at Stanstead, and also as to the nature and feasibility of the middle and eastern routes as compared with the western route, which was ultimately adopted.

The evidence of the proceedings of the meeting at Stanstead we think was not admissible. It was not claimed by the plaintiffs when this testimony was offered, that the defendant was present at the meeting, or had any knowledge of what was said or done there; of course he could not be bound by anything that transpired on that occasion. It was not admissible as tending to show what the parties intended by the terms used in the contract, as it does not appear that either party knew anything about it, neither was it admissible as tending to show how the words were generally used, for it does not appear that anything was said there upon that subject. The only question was, what the words "Derby Line" would mean when inserted in a contract like the present, whether they would mean the same as "Derby Line village," or not; some thought they would, others thought they would not. Neither was it admissible as tending to contradict the testimony of witnesses who were present at the meeting, and who also testified that they had never heard the words "Derby Line" used except as referring to the village. Indeed, it does not appear from the case to have been offered for any such purpose, but if it had been, it does not appear that the words "Derby Line" were used on that occasion as referring to the town line. The simple question discussed then was, whether these words might or might

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not be so construed, and for aught that appears, the question was for the first time raised on that occasion.

The evidence should have been rejected. The court however charged the jury, that this evidence must "have no effect in this case, unless the facts were known, and assented to by the defendant."

This raises the question whether it is competent for the county court to admit improper evidence, and then in the charge to correct the error as far as practicable, by withdrawing it and directing the jury not to consider it in making up their verdict.

That the county court must have a large discretion in regard to the manner in which trials shall be conducted before juries, must be conceded. For the county court to exclude from the jury all evidence that is inadmissible, is exceedingly difficult if not impossible. Evidence is every day offered in the county court, which at the time it is offered and standing alone, is clearly inadmissible. Indeed a large part of the testimony offered in court standing alone, could have no effect; it is only when taken in connection with other evidence that it has any weight. When such testimony is offered, accompanied with the statement of the counsel offering it, that he in good faith intends to connect it with other testimony, which when introduced will make the offered testimony admissible, the court must receive it, for in many cases, if such other testimony is offered first, it will be liable to the same objection, neither being admissible alone, but together, both are so. If however it turns out that after one part is put into the case, the attorney finds that he is unable to prove the other, there is no other way in which the court can correct the error, except to instruct the jury to disregard it. So when evidence gets into a case through inadvertence, or where, as sometimes happens, when all the evidence is in on both sides, the case assumes a form that is unexpected by both parties, and that renders more or less of the evidence immaterial, the court must regulate the matter by their charge.

In jury trials all will concede that the introduction of inadmissible evidence is an evil and calculated to do mischief, still, as we have seen, it is one that under the best administration of justice, cannot always be avoided, yet as it is an evil, it is clearly the

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duty of the court conducting the trial to avoid it by excluding such evidence whenever it can be seen that it ought to be done. The evil must be tolerated so far as it cannot reasonably be avoided, beyond that it should not be. When inadmissible testimony is introduced into a case, it is taken by the jury and weighed by them with the other testimony, it is commented upon by counsel, and before the charge is given them, their minds (very probably) are made up on the very point upon which this testimony bears. Such being the case, when the court tell them this testimony must not be allowed to have any effect in forming their opinion, will they necessarily change their opinion, even though without this evidence they might have formed a different one? Will they be able to analyze the operation of their own minds, so as to know precisely how much influence this evidence had upon them, or will they take the trouble to do it if they are able? Will they not rather give up the evidence as directed by the court, and retain and act upon the opinion?

The introduction of this kind of evidence with the intent to withdraw it, so that no harm may ensue, is an experiment, the result of which the court can never certainly know.

We think that in all cases where testimony is offered that in the then present aspect of the case is inadmissible, unaccompanied with any assertion on the part of the attorney offering it, that he intends and expects to introduce other evidence, which when in will make such testimony admissible, the testimony, if objected to, should be rejected, and to admit it is an error that is not cured by the court's directing the jury in their charge to lay it out of the case. If in the further progress of the trial, the case assumes a position that renders the rejected testimony admissible, the evidence can then be introduced, so that no proper testimony is excluded and no improper testimony received.

The case of *Northfield v. Plymouth*, 20 Vt. 582, is not at variance with this position. In that case an entire deposition was objected to, and the court admitted it. In the supreme court it was found that there was some irrelevant matter in it; the court refused to grant a new trial for that reason. They say if there is time it would be better to determine in advance, even on a *general* objection, what was inadmissible; on a specific objection it

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would ordinarily be done. The case was put mainly upon the ground that the general scope of the testimony was admissible, and no specific objection pointed out, and that the jury were correctly instructed in relation to it. But the court say that when the general scope of the testimony is inadmissible it is highly proper it should be stopped in the outset.

We think also that the testimony as to the character and feasibility of the middle and eastern routes, as compared with the one adopted, was wholly inadmissible in any aspect in which the case was presented.

It was not admissible to show how the parties understood the contract. It might have been admissible for this purpose if the several routes had been surveyed, and it had been found impossible to construct a road to Derby Line Village, as in that event, the probability would be that the company would not take subscriptions conditioned that they should construct a road to a point to which they knew they could not go, but no such fact existed, so that it was not admissible for any such purpose.

But it is said that this testimony was admissible to show that the plaintiff did not adopt the route to the village, for the reason that the route which they did adopt was so much preferable to the others, that, although it took the road three and one-half miles from the village, their duty to the public and the stockholders required the directors to adopt it. All this may be true; still if the contract was that the road should be put under contract to Derby Line Village, and the road which they put under contract was not a road to that point, within the fair and reasonable meaning of such contract, so as to be a compliance with the condition, it is certainly no answer to say, when this failure is set up as a defence, "we did not run our road there because it was better for us and the public to go elsewhere, and our duty required us to do so." This might be a good answer for the directors to the company or the public, but it is no answer to this defence. If such was the contract it would be no answer to this defence, if it was physically impossible to construct a road any nearer to the village. If the plaintiffs fail to comply with the condition, it is done at the sacrifice of all the subscriptions that were obtained on the strength of these conditions. Consequently all this evidence as to the difficulty

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expense of complying with this condition is immaterial as it furnishes no excuse for not doing so. On the other hand, if the point to which the road was run was a compliance with the conditions, then this evidence was immaterial.

Whether the condition was performed, or not, depended upon the distance the road run from the village, and not upon the ease or difficulty of getting there.

When this evidence was put into the case, and made to occupy a conspicuous position, and the jury required to pass upon it by their verdict, it is easy to see that it might have had an important bearing in the minds of the jury in determining the defendant's liability.

The defendant claimed and requested the court to charge the jury that if the plaintiffs' agent, who obtained the defendant's subscription, represented that the route intended by the written condition was the one terminating at Derby Line Village, and the defendant acted upon such understanding, the plaintiffs were bound by that understanding, whether occasioned fraudulently or not.

We think the defendant was entitled to a charge substantially according to this request, especially as the case hinges upon this very point of how the parties understood the words "Derby Line" when the contract was executed.

On examining the charge it is apparent the idea embodied in this request, was in the mind of the judge, and it may be extracted from the charge, still it is so connected with the idea of fraud on the part of the plaintiffs' agent in procuring the subscription, that the jury may have been misled; this idea does not seem to be distinctly enunciated, disconnected from the idea of fraud, and we think it quite probable that from the charge, and all the evidence, the jury took to their room the idea that if, at the time the defendant signed the paper, the plaintiffs' agent represented to him that the words "Derby Line," as used in the contract, referred to the village, the agent in so doing acting in good faith, he and the plaintiffs then intending to have the road run to that point, and they afterwards ran the road as near to the village as they could, in justice to the public and the stockholders, in consequence of the difficulties and obstructions in the other routes, in that event the defendant ought to pay the subscription.

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It would seem on carefully examining this charge that the judge below, prompted by that sense of justice which pervades his whole character, in his endeavors to present the case with perfect fairness and impartiality, lost sight for the moment of another important consideration, namely, the necessity of presenting the point upon which the case really turns in all its aspects, so as to make it perfectly intelligible to the jury.

We think the defendant was entitled to a more distinct and explicit charge upon this point, to which the attention of the court was directed by the request.

Other points were raised upon the argument, but under the view we have taken of this case, it is not necessary we should pass upon them.

Judgment of the county court reversed and the case remanded.

LORENZO SLACK v. THE TOWN OF NORWICH.

Statute of limitations. Record. Evidence. Taxes.

The plaintiff sued the town of Norwich to recover back certain taxes paid by him, in the years 1848 to 1854 inclusive, on a school lot leased to and occupied by him, which was by statute exempt from taxation. The defendant pleaded the general issue and the statute of limitations. To the latter plea the plaintiff replied a new promise, and, to prove it, introduced in evidence a copy, from the town records, of a vote of the town, passed at an adjourned March meeting in 1855, as follows: "On motion, voted that the matter of Lorenzo Slack, relative to his having been taxed on more land than he actually possessed, be referred to the selectmen." The plaintiff then offered to prove by parol that at the same meeting a motion was made and carried in the affirmative by vote of the town, as follows: "that the matter of Lorenzo Slack against the town of Norwich, be referred to the selectmen to go to the records and find what was due Mr. Slack, and draw an order in his favor on the treasury for that amount;" *Held*, that the testimony offered was inadmissible for the reasons, first, that parol evidence of the vote offered to be proved could not be received until it was shown, either that the vote had not been recorded or that the record of it was lost or destroyed; and, second, that record evidence of a vote of a similar character, passed at the

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same meeting, had already been introduced by the plaintiff, which, in the absence of proof to the contrary, would be presumed to be the same vote as that of which the parol proof was offered, and the record of the vote could not thus be varied or added to by parol.

In an action against a town to recover back the taxes paid upon land which was by statute exempt from taxation, recovery can be had only for what have been paid as town taxes and have gone into the town treasury.

When it is apparent that certain evidence, introduced under objection, had no effect upon the verdict, the propriety of admitting the evidence will not be considered by the supreme court.

A proposition by a debtor to his creditor to pay a specific sum in compromise of a disputed claim, fixing a definite time for its acceptance, and providing that, if not accepted within that time, it shall go for nothing, is not sufficient to prevent the operation of the statute of limitations upon the claim.

So also of a proposition, not accepted by the creditor, to pay a definite sum in settlement of a disputed claim.

ASSUMPSIT. Pleas, the general issue and statute of limitations; replication to second plea a new promise; and trial by jury, at the May Term, 1859,—REDFIELD, Ch. J., presiding.

The plaintiff claimed to recover back from the defendant certain sums of money paid by him as taxes upon a school lot leased to and occupied by him, which was by statute exempt from taxation. It appeared that in 1847 and 1852 there were assessed to the plaintiff, by the listers of Norwich, one hundred and fifty acres of land, which assessment included the school lot of fifty acres, and that the whole was appraised at thirteen dollars and twenty-five cents per acre in 1847, and at thirteen dollars per acre in 1852; that these appraisements of the school lot went into the grand list, and were continued there until the plaintiff sold in 1854; that taxes were assessed on these lists from 1848 to 1854, inclusive and that he had paid them.

The plaintiff, to prove a new promise, introduced a copy from the records of the town of Norwich, of a vote passed by the town at an adjourned March meeting in 1855, as follows: "On motion, voted that the matter of Lorenzo Slack, relative to his having been taxed on more land than he actually possessed, be referred to the selectmen." The plaintiff also offered to prove by parol that at the same meeting a motion was made and carried in the affirmative by vote of the town as follows: "that the matter

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of Lorenzo Slack against the town of Norwich be referred to the selectmen to go to the records and find what was due to Mr. Slack, and draw an order in his favor on the treasury for that amount." This was objected to by the defendant, excluded by the court and the plaintiff excepted.

The plaintiff introduced a letter of the selectmen to him, (marked A) of which the following is a copy :

NORWICH, Saturday eve. Dec. 4, 1858.

"MR. LORENZO SLACK, Dear Sir: At an adjourned town meeting to-day, after hearing the report of the committee appointed last Saturday to investigate your claim against the town of Norwich and report the facts, instructed the undersigned to offer you twelve dollars and fifty-two cents to compromise and settle your claims, provided you will accept of that sum and the taxable costs to this time, and give a discharge in full. We are, therefore, ready to comply with the instructions, provided you notify us of your acceptance by nine o'clock Thursday morning next week. If we hear nothing from you on the subject we shall take it for granted that you do not accept, and that this proposition to settle will go for nothing." The plaintiff also introduced the bill presented by him, (marked B) together with an offer of the selectmen thereon. Under the decision it is unnecessary to copy the bill. The offer referred to was without date and in these words: "The selectmen will give you an order for eighteen dollars and twenty-seven cents, if that will settle the above. (Signed)

H. BURTON, for the Selectmen."

The defendant offered evidence to prove that the fifty acres was not of so great value as the other one hundred acres, and that the buildings were on the one hundred acres, for the purpose of reducing the appraisment below what it was set in the list, to which the plaintiff objected. The court admitted the testimony and the plaintiff excepted.

The plaintiff requested the court to charge the jury that the letter marked A, and the bill marked B, were evidence to be considered as tending to prove a new promise: and also that if they found that the plaintiff was entitled to recover of the defendant the amount of taxes assessed as town and highway taxes, that he is also, for the same time, entitled under the count for money

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paid, laid out and expended, to the State and school taxes; but the court refused so to instruct the jury, and did instruct them that the letter and bill, with the statement or offer of the selectmen, were not testimony tending to prove a new promise, and should not be considered by them.

The jury returned a special verdict awarding the plaintiff ten dollars and two cents damages and his costs. They called the land, as appears by their verdict, fifty acres, and the appraisal thirteen dollars per acre.

The jury informed the court that they included in their verdict the amount of town and highway taxes paid in the years 1852, 1853 and 1854. The court rendered judgment upon the verdict, being for all that had been paid by the plaintiff within six years of the commencement of this action, and interest from the time of payment, and refused to give judgment for any sums over paid more than six years before suit, or for sums paid on State and State school tax, which were not in the hands, and did not go for the benefit, of the defendant. To all which the plaintiff excepted.

R. Lund, for the plaintiff.

H. Burton and Washburn & Marsh, for the defendant.

BARRETT, J. The plaintiff seeks to recover for taxes paid by him from 1847 to 1854, inclusive, assessed on fifty acres of school lot, so called, which the defendant concedes was not by law subject to assessment and taxation. Upon the issue formed upon the replication of a new promise to a plea of the statute of limitations, the plaintiff introduced in evidence a copy of the record of a vote passed at an adjourned March meeting of said town, in the year 1855, referring this matter of excessive taxation to the selectmen, no question being made as to its admissibility, or as to the instructions given to the jury in respect to it. He also offered to prove by parol that, at the same meeting, a motion was made and passed referring this matter to the selectmen, with specific instructions to find what was due Mr. Slack, and draw an order in his favor on the treasury for that amount: which instructions were not contained in the vote as shown by said record.

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This offer was objected to and rejected, to which rejection the defendant excepted.

As the case does not show that the vote thus offered to be proved was not recorded, it would seem, upon familiar principles, that this exception cannot be sustained. If it was recorded, that record was the only legitimate evidence of the vote. Parol evidence would not be admissible to prove the vote, till it had been shown that such record was lost or destroyed. But for another reason, in our opinion, that evidence was properly excluded. The plaintiff had already given record evidence of a vote which, in the absence of proof to the contrary, would be presumed to be the only vote of that meeting of a similar character on that subject. The parol evidence was not offered for the purpose of showing that *another* vote was passed, but that the vote of which the record was made was in fact different from what the record shows it, that instead of being a vote of naked reference, it was really a vote of reference, *with the special instructions* that were offered to be proved by the parol evidence. We are not referred to, nor are we cognizant of any principle or rule of law that would permit *record* evidence to be thus varied and added to by parol. The case of *Hutchinson v. Pratt et al.*, 11 Vt. 421, hardly countenances what is claimed in the present case. The admission of parol evidence in that case was put exclusively on the ground that there was no record of the alleged vote. In this case the plaintiff himself shows that there is a record of the vote, but he claims that said record is inaccurate, and offers the parol evidence for the purpose of superseding the record by showing the vote actually passed to have been different from what the record states. In order to have found support in the case cited, the plaintiff should have shown to the court that there was no record of that vote to be found, instead of producing and giving a record of it in evidence.

The letter of the selectmen, (marked A) written in December, 1858, does not profess to recognize any lawful claim in favor of the plaintiff. It merely proposes specific terms for the compromise of this suit, and fixes a definite time within which the proposition would be open for acceptance, closing thus: "If we hear nothing from you on the subject we shall take it for granted that

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you do not accept, and this proposition to settle will go for nothing,"

Inferentially we conclude that the selectmen did not hear anything in the character of an acceptance of the proposition, and so by its terms it was to go for nothing as to the subject matter to which it related.

As the letter cannot be regarded as recognizing the existence of the debt claimed, accompanied with a willingness to remain liable for its payment, it cannot be treated as evidence of a new promise in any view. It hence becomes needless, in disposing of the exception taken to the instructions in the charge as to said letter, to discuss or decide whether the selectmen should be regarded as so the agents of the town as to bind it by an acknowledgment or a new promise in avoidance of the statute of limitations.

The paper marked B, without date, signed only by H. Burton, "for the selectmen," falls under the same rule and reason as the letter of the selectmen, above discussed.

The view, in which we are disposing of the exception taken to the charge touching these two papers, seems to be fully sustained by the case of *Aldrich v. Morse*, 28 Vt. 642.

As it appears that the verdict for the plaintiff was made up on the basis of the average valuation of all the land for which the plaintiff was assessed, there is no occasion to discuss the propriety of admitting evidence as to the value of said fifty acres as compared with the other part of the real estate.

As to the only other point of exception, it was expressly decided in *The Vt. Central R. R. Co. v. Burlington*, 28 Vt. 193, that recovery could be had of the town only for what had been paid as town taxes. The case of *Henry v. Chester*, 15 Vt., goes no further. It was only for the taxes that had gone into the town treasury that he was held entitled to recover.

It would seem that the counsel citing that case is under a misapprehension as to the force and application of the language of the opinion, which will be corrected by recurring to the point made by counsel in the brief, to which said language of the court was addressed. The point was, "that if the list was void, in the action for money had and received, the plaintiff should recover

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only what the defendant could not equitably retain, that is, the part only which he should not have paid." Upon this it was held that, the list being void, the town had no lawful right to hold any money collected by way of taxes raised on said list, having reference only to the money that had gone as taxes into the town treasury.

As we see no error in the case, the judgment is affirmed.

SUSAN S. GIBSON, *Administratrix* of BUSHROD R. GIBSON, v.
DANIEL RIX.

Promissory Note. Principal and surety. Payment.

When the liability of a surety upon a promissory note has been once discharged by an arrangement between the principal promisor and the payee, by which the note is paid, no subsequent retraction or waiver of the payment by the principal promisor with the consent of the payee or his representatives, to which the surety was not a party or privy, though it should restore the obligation of the note so far as the principal is concerned, can revive the liability of the surety upon it.

ASSUMPSIT upon a promissory note, dated December 15, 1854, for one hundred dollars, payable to the intestate or order, February 1, 1858, with interest annually after January 15th, 1855. Plea the general issue, and trial by the court, at the May Term, 1859,—REDFIELD, Ch. J., presiding.

The note was read in evidence, and the plaintiff's authority as administratrix was admitted.

In defence it was shown to the satisfaction of the court, that the defendant signed the note with one Levi Rix, and as his surety. This note was given with two others, one of fifty dollars and one of one hundred dollars, and the three were payable respectively on the first days of February, 1856, 1857 and 1858. After two of the notes became due the intestate called upon Levi Rix for payment, and Levi told him he must trustee such persons as were owing him, naming them, which was done, and before

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the return day of the writs these persons came in to settle, and it was mutually agreed that the intestate should take such of their notes as he considered good, and it was agreed between him and Levi Rix that he should take such notes, at his own risk, in payment of the three notes in question. The parties had a reckoning as to the amount, and ascertained that the notes were in this mode overpaid some twelve or fifteen dollars. It remained in this way till near the death of the intestate, when he sent back to Levi Rix one of the notes taken in payment, which was not then due, but was secured by mortgage on real estate. Levi, supposing that the intestate did not wish to retain it, because of its not being then due, took it and has since retained it. He then had no knowledge that the intestate had parted with, or intended to part with, either of the three notes.

But it afterwards appeared that about three weeks before he died, which was on the 25th of March, 1858, the intestate sold and delivered the note in suit to one William W. Gibson, as payment upon notes he owed him, and about the first of May, 1858, the latter sold and delivered it to another person for a valuable consideration for whose benefit this suit is brought by consent of the plaintiff.

Levi Rix had notice from William Gibson of the transfer of the note to him a few days after the death of the intestate. When the commissioners on the estate of the intestate met, Levi Rix, supposing that to be the course to save his rights, presented his claim and it was allowed against the estate in full, including all the payments on these notes, amounting to two hundred and forty-five dollars and thirty-seven cents, and two of the three notes (the one in suit being excluded,) with a small balance of account, were allowed as an offset, being one hundred and eighty dollars, leaving a balance of sixty-five dollars and thirty-seven cents in favor of Levi Rix, which had been made as a payment upon the note in suit.

Levi Rix paid into court the amount due upon the note in suit, except the balance of sixty-five dollars and thirty-seven cents, and all the costs up to and including the term at which the case was tried, which was accepted and taken out of court by the party for whose benefit this suit is prosecuted.

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The court decided that the plaintiff was entitled to recover the balance remaining unpaid upon this note, but that the judgment should be certified to the probate court to enable that court to offset the same against the amount allowed to Levi Rix for what was in fact a payment of the very sum for which this judgment is recovered, if the probate court should deem the same equitable and just.

To this decision both parties excepted.

Washburn & Marsh, for the plaintiff.

Converse & French, for the defendant.

KELLOGG, J. The statement, in the bill of exceptions, of the facts shown to the satisfaction of the county court on the trial, is in the nature of a special verdict or case, upon which judgment was rendered in that court, and this court is called upon to revise the case only in reference to the conclusions of law which are applicable to the facts so found.

It is expressly found by the county court that the notes of the persons summoned as the trustees of Levi Rix, the defendant's principal, which were taken by the intestate under an agreement between him and said Levi, were received and accepted by the intestate in payment of the three notes, including the note in suit, which were executed to him by the said Levi and the defendant. This is equivalent to an agreement upon good consideration for the substitution of new debtors, and when the notes of the persons summoned as trustees were delivered to the intestate, and accepted by him, it became an accord executed, and would have the effect to release and extinguish the liability of Levi Rix and the defendant on the three notes executed by them to the intestate. The defendant, bearing the relation of surety on these notes, and his liability being but an accessory to that of his principal, comes within the application of the rule, well established both at law and in equity, that a discharge to the principal is a discharge to the surety; (Byles on Bills, p. 189.) The note in suit not having been transferred by the intestate until after it became due, it must be treated as being subject, while in the

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hands of William W. Gibson, to whom it was so transferred by the intestate, as well as in the hands of the present holder, for whose benefit this suit is prosecuted in the name and by the consent of the plaintiff as the personal representative of the intestate, to the same equities or defences which would attach to it if it was held in the right of the intestate, and the suit was prosecuted for the benefit of his estate.

But it is contended on the part of the plaintiff that Levi Rix having presented a claim to the commissioners on the estate of the intestate for the payments made by him on the three notes, and the amount of those payments having been allowed to him as a claim against that estate, those payments are merged in that allowance, and should be treated as having been waived. It was undoubtedly competent for Levi Rix, with the consent of the intestate in his lifetime, or of his administratrix after his decease, to retract any payment which he made on the note in suit, and thereby to restore the obligation of the note, so far as he was concerned individually; but after the liability of the defendant upon this note was released and discharged, it could only be restored by his own agreement or consent, and could not be revived or in any manner affected by any act of Levi Rix, his principal, to which he was not a party or privy. The presenting by Levi Rix before the commissioners on the estate of the intestate, of his claim against that estate, and the allowance of that claim by the commissioners as stated in the bill of exceptions, would therefore, whatever might be its effect as against him, be entitled to no effect whatever as against the defendant, unless accompanied by proof that such presentation and allowance was made with the privity and consent of the defendant. No such fact appears in the case, nor does it appear that the return by the intestate to Levi Rix of one of the notes which the intestate took from him in payment as above mentioned, was with the consent or knowledge of the defendant. If the liability of the defendant on the note in suit had not been satisfied and discharged, he might well have complained of the giving up by the intestate to his principal of any security which the intestate held for the payment of that note, if it was done without his consent, for it is a doctrine of equity that the surety is entitled to the benefit of all the

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securities and remedies which the creditor may hold against the principal.

We consider that, upon the facts found by the county court, the defendant was entitled to a judgment in his favor, and the examination of other questions raised on the argument accordingly becomes unnecessary. The judgment of the county court is reversed, and judgment rendered in favor of the defendant.

JULIUS CONVERSE v. ORISON FOSTER.*Promissory Note. Consideration. Intoxicating Liquors.*

A contract made in this State for the purchase of spirituous liquors, contrary to the statute of 1846, (acts of 1846, No. 24, p. 18,*) the vendor having knowledge that the liquors were to be sold here by the vendee without a license, is illegal, under the act of 1846, No. 24, although the delivery of the liquors was made in another State, where the vendor resided and did business, and where the sale would have been legal; and the fact that the promissory note for the price of the liquors was subsequently made in the latter State does not render the note valid as between the original parties to it, or in the hands of any holder with notice of the illegality of the consideration.

But in the hands of an indorsee for value, who bought it before its maturity and without notice of any illegality in its consideration, the note is valid and collectible.

It seems that the rule would be the same under the act of 1852 in regard to traffic in intoxicating drinks. POLAND, J.

Illegality of consideration is no defence to a suit brought upon a note or bill by a *bona fide* holder for value, who obtained it while current and without notice of the illegality, unless the statute making the consideration illegal, expressly provides that the contract shall be void.

ACTION upon a promissory note for one hundred and seven dollars and fifty-two cents, dated Boston, Nov. 14, 1849, payable to Loton, Gassett & Co., or order, six months after date, and

* Which act provides a penalty for its violation, but does not in express terms declare the contract for such illegal sale to be void.

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indorsed to the plaintiff. Plea, the general issue, and trial by the court at the May Term, 1859,—REDFIELD, Ch. J., presiding.

The facts found by the court, which it is material to state, are as follows: The note was given in Boston, Massachusetts, at the time it bears date, for spirituous liquors. The defendant had been in the habit of purchasing liquors of Loton, Gassett & Co., in Boston, who were dealers in spirits there, which he sold at Northfield, Vermont, without a license. This fact was understood by Loton, Gassett & Co. The defendant had closed his business at Northfield before October, 1849, and employed his brother, Henry Foster, to attend to its settlement. These liquors were bought to be sold by Henry, at Northfield, while attending to the settlement of the defendant's business. It was agreed that the defendant should pay Loton, Gassett & Co. for what liquors his brother bought, and the note in question was given pursuant to that agreement. The contract for these liquors was made at Northfield between Henry Foster and Charles Gassett, an agent of Loton, Gassett & Co. for selling liquors in Vermont. The liquors were sent by Loton, Gassett & Co. by putting them into the custody of common carriers at Boston, directed to Henry Foster, at Northfield. Henry Foster had no license to sell liquors in Vermont, and this was known to Charles Gassett at the time of the contract.

The note was sold and indorsed by Loton, Gassett & Co. to one Swazy, for value, and Swazy transferred it for value to Frederick Smith, about the first of April after its date, who has continued the owner ever since.

The court rendered judgment for the plaintiff for the amount of the note, to which the defendant excepted.

Washburn & Marsh for the defendant.

Charles M. Lamb and *Converse & French* for the plaintiff.

POLAND, J. Under the decision of *Territt et al. v. Bartlett*, 21 Vt. 184, and several cases since, following that case, the note in suit must be regarded as founded upon an illegal consideration, and therefore invalid between the original parties,

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and in the hands of any holder with notice of such infirmity. The contract for the sale of the liquors being made in this State, with the knowledge that they were to be sold here in violation of our statute, made the sale illegal, though the delivery was in another State, where such sale, for aught that appears, would have been legal. The fact that the note for the price was subsequently given in Boston, we think did not make the note valid, or vary the case from what it would have been if given in this State.

The plaintiff must rely therefore wholly upon the effect of the negotiation of the note, so that he stands in the position of a bona fide holder of the note for value, and without notice of any illegality in the consideration for which the note was given.

The depositions mentioned in the exceptions as containing the facts upon this subject, have not been shown to us, but no question is made by the defendant's counsel, but that the plaintiff is entitled to any and all advantage arising from the position of being such a holder of this note.

Does this fact entitle the plaintiff to recover upon the note, when the original payee could not? The defendant claims that not only was the consideration of the note illegal, but that the note was absolutely *void*, not only in the hands of the original payee, but that it so continued into whosever hands it might come by subsequent transfer. The English decisions under the early statutes of that country against usury and gaming, are quoted in support of that view. There is no occasion or reason, we think, to question the soundness of those decisions, and they have been adopted and followed in this country under similar statutes. But are they applicable, and in point to the present case?

The statute of this State in force at the time of this transaction, prohibited all sales of spirituous liquors except for certain specified purposes, and by certain persons duly licensed therefor, and imposed a penalty for all acts of selling in contravention of the law, but contained no provisions in reference to the legal effect, or binding force of such illegal contracts of sale, or of any securities given for the price of liquors so illegally sold.

The English statutes against usury and gaming, not only

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impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds, and other securities given upon such illegal considerations shall be *utterly void*. All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject turn upon this very distinction and difference between these statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the *security*, whether bill or note, *void*, the defendant may insist on such illegality, though the plaintiff or some other party between him and the defendant, took the bill or note *bona fide*, and gave a valuable consideration for it. But unless it has been so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a *bona fide* holder for value without notice of the illegality, unless he obtained the note or bill after it became due. This doctrine is fully stated by Mr. CHITTY and Judge STORY in their treatises on Bills and Notes; see also *City Bank v. Barnard*, 1 Hall 70; *Vallette et al. v. Parker*, 6 Wend. 615.

Under the statute of 7 Geo. 2, c. 8, against stock-jobbing, which provided that all *contracts* for the price or value of stocks and securities mentioned in the statute, should be null and void to all intents and purposes whatsoever; it was held that a bill of exchange given in respect of such a transaction, was invalid between the original parties, but was valid and collectible in the hands of a *bona fide* holder without notice of the illegality, who received it for value and while current; *Chitty on Bills*, 92, and cases cited in notes E. and F.

This question was really decided by this court in *Pinder v. Barlow*, 31 Vt. 529. A note of the decision will be found in the Law Reporter, March, 1859, 696. That case arose under the statute of 1850, which in respect to the consequences attached to the illegal contract, was substantially the same as that of 1846, under which this case arose. The defendant owed Meech for liquors sold contrary to the statute, and Meech owed the plaintiff a legal debt. Meech and the defendant settled, and the defendant gave his note for the amount due for the liquors, but Meech informed him, that he wished to let the plaintiff have the

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note in payment of his debt to him, and therefore made the note payable directly to the plaintiff.

The plaintiff received the note of Meech in payment of his debt, with no knowledge of the consideration for the note between Meech and the defendant. It was held that the plaintiff really stood in the position of a *bona fide* holder of the note and was entitled to recover upon it. In the opinion, which was delivered by the Chief Justice, it is intimated that under our present statute, which provides that no action shall be maintained for the recovery or possession of intoxicating liquor, or the value thereof, except such as are sold or purchased in accordance with the provisions of this act, the question might merit a different consideration. But it has been recently held by the supreme court in Massachusetts, under a statute almost identical with ours in this particular, that a note given for the price of liquors illegally sold, was valid and collectible in the hands of a *bona fide* holder. This decision seems in accordance with the current of decisions on the subject.

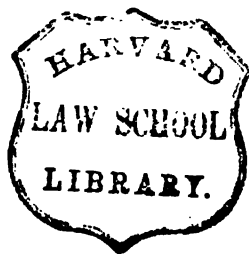
The argument of the defendant's counsel is based mainly upon an expression of REDFIELD, J., in *Territt v. Bartlett*, "that a contract which has for its object, or which contemplates any act prohibited by express statute, or the commission of which incurs a penalty, is as much illegal and void as if the statute in express terms so declared." But it is to be remembered that the question in that case was wholly as to the binding effect of such contract between the parties to it, and no question was before the court, or discussed, as to the effect of a transfer of a negotiable security given upon such an illegal consideration. The plaintiff claimed in that case, that as the statute did not declare the contract void in such case, but only imposed a penalty for selling, the contract should be held good and enforced, and that it came within a class of English cases where contracts in violation of certain revenue laws have been held valid, though prohibited under a penalty.

But the court refused to adopt this view, and held that as the object and purpose of the statute was to prevent the general and unrestricted sale and use of ardent spirits, and such sale was

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made unlawful, and punished by a penalty, that all such contracts must be considered unlawful, and the law would not aid in enforcing them. The statement that such a contract is *illegal* and *void*, was proper enough when applied to the original contract between the parties; it means merely that the law will not enforce it. The contract is void in the same sense that any contract is void which is not supported by any consideration. It is a common expression, and one frequently found in the books, that a contract not supported by a consideration is *void*. Still, as applied to negotiable instruments this is not technically correct, for though they cannot be enforced between the original parties, the want of a consideration furnishes no defence to such instrument in the hands of a *bona fide* holder. The general effect of illegality of consideration is precisely the same, and is, or is not, a defence under the same circumstances.

The judgment is affirmed.



LORENZO RICHMOND v. HARVEY H. WOODARD AND OTHERS.

Construction of Bond. Written Instruments.

If the name of a person in a written instrument is wrong, or applies to a wrong person, the court will correct it by construction, when it is apparent upon the face of the instrument that the error exists, and in what manner it should be corrected to carry out the intention of the parties.

The defendant, Woodard, as principal, and the other defendants as sureties, executed to the plaintiff, described therein as sheriff of Windsor County, a bond, in the penal sum of ten thousand dollars, with the following condition:—"The condition of the above obligation is such that, whereas, the above bounden Harvey H. Woodard, has been appointed by Lorenzo Richmond, sheriff as aforesaid, a deputy sheriff within and for the county of Windsor, and has taken a deputation to that effect. Now if the said Minot Wheeler shall at all times, save the said Lorenzo Richmond, sheriff as aforesaid, harmless from all damages, risk, liabilities, or causes of liability, in

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consequence of neglect, misconduct, malfeasance, or misfeasance, in the matters appertaining to the said office of sheriff, then the above obligation is void and of no effect, otherwise in full force and effect." The name "Minot Wheeler" occurred nowhere else in the instrument. *Held* that the bond should be construed the same as if the name "Harvey H. Woodard" had been originally written therein in place of "Minot Wheeler."

DEBT on bond. Declaration for that the defendants, Harvey H. Woodard, Daniel Tarbell, Jr., Edward B. Stanley, Horatio K. Blake and Solomon Downer, "respectively, on the 27th day of December, 1852, by their writing obligatory of that date, sealed with their seals, and which the said Richmond produces here in court, jointly and severally bound and acknowledged themselves to be indebted to the said Richmond, then, as now, sheriff of Windsor county aforesaid, in the sum of ten thousand dollars, to be paid to the said Richmond, his heirs, executors and administrators, or assigns, on demand; yet the defendants, though often requested, have not, nor have any of them, paid the same, but neglect and refuse so to do."

The defendants, Woodard and Downer, craved oyer of the bond and its condition, which were as follows:

"Know all men by these presents, that we, Harvey H. Woodard, of Royalton, as principal, and Daniel Tarbell, Jr., E. B. Stanley and H. K. Blake, of said Royalton, and Solomon Downer, of Sharon, in the county of Windsor, and State of Vermont, are jointly and severally holden and stand firmly bound and obliged unto Lorenzo Richmond, of Woodstock, in the county of Windsor, and State of Vermont, Esquire, sheriff of said county of Windsor, and keeper in chief of the common jail in said Windsor County, in the sum of ten thousand dollars, current money of the United States, to be paid to the said Richmond, his heirs, executors, administrators or assigns; to which payment well and truly to be made, we jointly bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents. Signed with our hands and sealed with our seals, this 27th day of December, A. D. 1852."

"The condition of the above obligation is such, that whereas, the above bounden Harvey H. Woodard, has been appointed by Lorenzo Richmond, sheriff as aforesaid, a deputy sheriff within and for the county of Windsor, and has taken a deputation to

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that effect. Now if the said Minot Wheeler shall, at all times, save the said Lorenzo Richmond, sheriff as aforesaid, harmless from all damages, risk, liabilities, or causes of liability, in consequence of neglect, misconduct, malfeasance or misfeasance, in the matters appertaining to the said office of sheriff, then the above obligation is void, and of no effect, otherwise in full force and effect."

To this and the plaintiff's declaration the defendants, Woodard and Downer, demurred generally.

The county court, at the December Term, 1859, REDFIELD, Ch. J., presiding,—*pro forma* adjudged the declaration insufficient, and the plaintiff excepted.

Charles M. Lamb, and A. Tracy for the plaintiff.

Washburn & Marsh for the defendants.

PIERPOINT, J This case stands upon a demurrer to the plaintiff's declaration, based upon an alleged defect in the condition of the bond declared upon. The bond itself is set out upon the record; of course no question arises as to the admissibility of evidence to explain any ambiguity that may appear upon the face of the instrument. The question is one of construction alone, and to be determined solely by the light afforded by the instrument itself.

In construing written instruments, the first point to be ascertained, as a guide to its meaning, is, what was the intention of the parties; what object did they intend to accomplish when they made the instrument. When that is ascertained it is the duty of the court so to construe the contract as to effectuate that intention, provided it can be done without violating the established rules of law on the subject.

What then was the intention of these parties in making the instrument declared upon. It appears upon the face of the instrument that the plaintiff, Lorenzo Richmond, was the sheriff of Windsor county, and the bond is taken to him, describing him in his official capacity. It further appears, that one of the defendants, Harvey H. Woodard, who is the principal in the

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bond, had been appointed by the plaintiff a deputy sheriff, for said Windsor county. The condition provides tath the said Richmond, sheriff as aforesaid, is to be saved harmless from all damage, risk, etc., in consequence of neglect, misconduct, etc., in matters appertaining to said office of sheriff, and in that event the bond to be void. On this state of facts, who was it that the parties intended should save the plaintiff harmless, and from what, in order to discharge the obligation of this bond. There seems to be but one rational answer to this question, and that is, that Harvey H. Woodard, was to save the plaintiff harmless from all said Woodard's neglect, or misconduct, in matters appertaining to the office of sheriff.

No question, we think, can be made, but what that was the intent and purpose of the parties.

The condition reads as follows: "Now if the said *Minot Wheeler* shall, at all times, save the said Richmond harmless," etc. We think the insertion of the name of Minot Wheeler, in this connection was clearly a mistake on the part of the person who drafted the bond, and that the error was not noticed when the bond was executed. His name does not appear in any other part of the instrument, and has no appropriate place where it is. The person who drafted the instrument shows his intention to insert the name of some person whose name had before been used in the instrument, by preceding the name with the words "the said," etc.

As we have already said, the insertion of the name of Minot Wheeler in this bond, was clearly a mistake as evidenced by the bond itself, and in this respect the bond is not in accordance with the clear intention of the parties, and to make it so requires that it should be construed the same as though the name of Harvey H. Woodard occupied the place now occupied by that of Minot Wheeler.

Can this court, without violating the established rules of construction, so construe it?

Judge PARSONS, in treating of the construction of contracts, lays down the following: "An inaccurate description, and even a wrong name of a person, will not necessarily defeat an instrument. But it is said that an error like this cannot be corrected

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by construction, unless there is enough besides in the instrument to identify the person, and thus supply the means of making the correction. That is, taking the whole instrument together, there must be a reasonable certainty as to the person. It is also said that only those cases fall within the rule in which the description, so far as it is false, applies to no person, and so far as it is true applies only to one. But even if the name, or description when erroneous, apply to a wrong person, we think the law would permit a correction of the error by construction, when the instrument, as a whole, showed certainly that it was an error, and also showed, with equal certainty, how the error might and should be corrected." If this rule as laid down is law, it removes all doubt as to the power of the court to correct this error by construction, for it will be conceded that the case before us comes clearly within the principle advanced. The case of the *Adm'r of Barnard v. Russell*, 19 Vt. 334, is a case in point. The question there arose as to the validity of a set off on execution. It was claimed to be void from uncertainty in the description of the land. In describing the place of beginning, it was said to be the northwest corner of a house; it appeared from other facts stated in the survey and the description of the lines and monuments, that the starting point must have been the southwest corner instead of the north, and unless the court could by construction substitute south in the place of north, the levy must be held invalid from uncertainty, as it would embrace no territory. The court gave the levy the same construction as though the word south had been written in the place of north, and held the levy good. This, we think, was going as far as we are required to go in this case.

In the case of *Jackson v. Stanley*, 10 Johns 132, a patent had been issued to a soldier in the name of David Hungerford; the land was claimed by the heirs of Daniel Hungerford as against one who claimed under one David Hungerford. Parol evidence was admitted to show that there was an error in issuing the patent, and that Daniel Hungerford was the person to whom the patent should have been issued. This was sustained, and the heirs of Daniel Hungerford held the land. If an error of this character, in such an instrument, can be corrected by the introduction of parol testimony to show the error, and how it should

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be corrected, it would seem that it should be done when, as in this case, the error and the means of correcting it are both apparent upon the face of the instrument. So, too, it has been held, when the intent of the parties require it, that "or" will be stricken out, and the word "and" inserted, even though the whole force and sense of the instrument is thereby changed. These cases and others that have been referred to, fully sustained the rule laid down by Judge PARSONS.

In this case we think this bond should be construed the same as though the name of Harvey H. Woodard, had been originally inserted in the place of that of Minot Wheeler.

When this is done, Woodard becomes the party who is to indemnify the plaintiff against liabilities in consequence of his neglect or misconduct in matters appertaining to said office of sheriff, which is virtually against all his acts as deputy sheriff, inasmuch as all acts of a deputy, as such, appertain to the office of sheriff, and are regarded in one sense as the acts of the sheriff, and for which the sheriff is responsible.

Judgment of the county court reversed.

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ABORTION.

It is not essential to the commission of the offence of attempting to procure the miscarriage of a woman pregnant with child, under the 8th section of chapter 108 Comp. Stat. p. 560, that the *fetus* should be alive at the time the attempt is made. *State v. Howard*, 380.

ACCOMPLICE.

In a criminal prosecution the testimony of an accomplice, in order to have any weight with the jury, must be corroborated upon points material to the conviction, and to such an extent as, upon the whole case, to satisfy the jury beyond a reasonable doubt of the guilt of the respondent. *State v. Howard*, 380.

ACTION.

1. In consequence of erroneous information given by an officer of a bank to the plaintiff in regard to the amount of money which had been there deposited to his credit by a third person, the plaintiff incurred certain expenses. This erroneous information was however given in good faith. *Held*, that it was a case of *damnum absque injuria*, and that the plaintiff could not recover of the bank the amount of such expense. *Herrin v. Franklin County Bank*, 274.

2. An officer is not precluded from recovering the price of an article of his own property, which he has sold at auction at the same time and place with other property of the same kind, which he has taken and advertised on an execution, by the fact that the purchaser bought it, supposing it to be the property of the execution debtor, nor by the sheriff's neglect to disclose that such was not the fact. *Rice v. Andrews*, 691.

3. If the giving of a credit for the price of property sold is on the condition that the purchaser's note, with a surety, be given therefor, and this condition is not complied with, but the property is taken by the purchaser, he is liable for the price before the expiration of the proposed term of credit. *Id.*

4. The assignee, under the insolvent laws of another State, of a non-negotiable *chose in action*, cannot maintain an action upon it in this State in his own name, notwithstanding the laws of such state expressly provide that he may do so, and though all the parties reside there. *Fisk et al. v. Brackett*, 798.

ADMINISTRATOR, *See* EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION, *See* PRESUMPTION 2, 8, 9; HIGHWAY 6, 7, 8,

AGENT, *See* PRINCIPAL AND AGENT.

AMENDMENT, *See* APPEAL 2.

APPEAL.

1. The defendant subscribed for one share of the plaintiff's stock, and thereby contracted to pay the plaintiffs one hundred dollars in ten equal instalments, no part to be payable till the performance of a condition precedent. In an action before a justice of the peace, the declaration set forth this contract, averred performance of the condition, and claimed to recover the first instalment under an *ad damnum* of ten dollars. *Held*, that the action was appealable. *Conn. and Pass. R. R. Co. v. Bates*, 420.

2. The defendant appealed from the judgment of a justice, but neglected to enter his appeal. The plaintiff, at the next term of the county court following the appeal, caused a copy of the justice's record, certified by the county clerk, (the justice, though out of office, still continuing to reside in the same county) to be entered for affirmance. The defendant moved to dismiss the suit on account of the defective mode of certifying the records and consequent want of jurisdiction. *Held*, that it was not error for the county court, pending this motion, to continue the cause to enable the plaintiff to file a properly certified copy of the record, and upon its being filed, to proceed and try the cause upon its merits. *Carruth v. Tighe*, 626.

3. The appellants, desiring to appeal from the decision and report of the commissioners upon claims against a deceased person's estate, prayed the probate court to be allowed an appeal from the order and decree of the court ordering such report to be allowed and recorded. At the same time they filed in the probate court their objections to the claim allowed by the commissioners. *Held*, that the appeal was regular. *Robinson v. Robinson's Ex'rs.*, 738.

4. In construing the statute (sec. 20, chap. LII., p. 353, Comp. Stat.,) which provides that an appeal from the report of commissioners upon claims against an estate, may be taken within twenty days after the return of the report to the probate court, the day when the report is returned is to be excluded. *Ib.*

5. If, on the last day allowed by statute for filing an appeal, after the usual business hours are over, and the office at which the appeal is required to be filed is closed, a party leaves his appeal in the actual possession of the proper officer to be filed, so that such officer has actual knowledge that it is so left and can then file it, and the officer, on the following morning, lodges it in the proper office, and enters it as filed on the day he actually received it, such appeal is regular and within time. *Ib.*

6. *Aliter*, when it is merely left at the officer's residence, and it does not appear that it actually came into his possession on the day prescribed by the statute for taking the appeal. *Ib.*

7. An appeal from probate, under such circumstances, is equally regular whether it be delivered to the register or judge of probate. *Ib.*

See BOOK ACCOUNT 3; NEW TRIAL 1.

ARBITRATION AND AWARD.

1. An arbitrator has no power to award costs of arbitration except when it is expressly given him by the submission. *Morrison v. Buchanans*, 289. X Y

2. A submission to arbitrators of all controversies between M. and B. (such controversies being represented by suits between them, a part in favor of one and a part in favor of the other,) provided that the parties should "abide the award of the arbitrators, and costs to be awarded to the parties who may succeed in said action, meaning all actions between the parties." Held, that this submission at most only authorized the arbitrators to award to either party so much of the costs of the reference as accrued upon the trial of the particular issues on which they respectively prevailed; and that the arbitrators having decided in favor of M. upon some of the issues, and in favor of B. upon the others, they had no authority to award that B. should pay all the costs of arbitration, including the arbitrators' fees. *Id.*

3. Under such a submission the arbitrators, after awarding to each of the parties respectively the costs already accrued in the actions in respect to which they prevailed, awarded "that B. pay the costs of arbitration, and that we allow M.'s costs as taxed at thirty-eight dollars and nine cents," and said nothing in the body of the award about their own fees, and merely noted the amount of them at the end of the award. Held, that the arbitrators had made no award in regard to the payment of their fees, and that M., having paid the greater part of such fees, could not, in an action on the arbitration bond, recover of B. the amount so paid by him. *Id.*

ASSAULT WITH INTENT TO COMMIT RAPE.

If one lay hold of a woman and use force upon her, with intent to have sexual intercourse with her against her will, and she resists his attempt for a while, but finally consents to the sexual connection then had with him, he is guilty of an assault with intent to commit a rape. *State v. Hartigan*, 607.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. If a general voluntary assignment for the benefit of creditors be made according to the laws of the domicile of the assignor, it will be valid to pass all the personal property of the assignor wherever situated, unless its operation is limited or restrained by some local law or policy of the State where the property is found. *Hanford v. Paine and Trustee*, 442.

2. The statute of 1852 relating to assignments, for the benefit of creditors, (Acts of 1852, p. 14,) was intended, so far as personal property is concerned, to apply only to assignments, either made in Vermont, or made elsewhere by residents of Vermont, temporarily absent, or who went from this State for the purpose of making the assignment. *Id.*

3. P., a resident of New York, made in that State an assignment of all his property for the benefit of his creditors. Among his property was an interest as partner in a stock of goods in a store in Vermont, which his partner, a resident of Vermont, carried on. The assignment was valid by the laws of New York, but it was not in accordance with the statute of this State relating to such

assignments, and no copy of it was filed in any county clerk's office in this State. *Held*, that the statute of 1852, in relation to assignments, did not apply to the case, and that as the assignment was valid by the laws of New York, the personal property assigned, situated in this State, after the assignees had taken possession of it, passed fully to them, and was not subject to be attached, or held by the trustee process, at the suit of the creditors of the assignor. *Id.*

4. The preference of the debts of our own citizens over those of the citizens of other States, in the case of a voluntary assignment for the benefit of creditors, made in another State by one domiciled there, and including within its operation personal property in this State, is to be deprecated except when by the laws of the State where the assignment is executed, such a discrimination is made in favor of its own citizens as would deprive our citizens of their fair proportionate share of the avails of the insolvent's property. *Id.*

See ACTION 4; ATTACHMENT 5, 6, 7; CONFLICT OF LAWS 1, 2.

ASSUMPSIT.

1. An infant is liable in assumpsit for money had and received for money tortiously taken by him. *Elwell v. Martin and Trustee*, 217.

2. And in such an action a debt due to the infant may be attached and held by the trustee process. *Id.*

X 3. A railway bond payable to bearer is a negotiable instrument, and may be declared upon and described in an action of assumpsit as a "bond," and a count thereon describing the cause of action as a "bond," and setting forth the promise contained in the bond, need not aver a consideration, and may be joined with a the common counts in *indebitatus assumpsit*. *Ide v. Conn. & Pass. R. R. Co.*, 297.

4. When one enters upon the land of another under an agreement of purchase which he subsequently fails to carry out, the owner cannot maintain an action of assumpsit for use and occupation against him. To sustain that action the relation of landlord and tenant must have existed between the parties, evidenced either by an express or implied contract, creating that relation. *Stacy v. VI. Central R. R. Co.*, 551.

See COMMON CARRIER 1, 2; FRAUDS, (STATUTE OF) 2; PAUPER 1, 2, 3, 4.

ATTACHING CREDITORS, See ATTACHMENT 7; MARSHALING 4; PROMISSORY NOTE 10.

ATTACHMENT.

1. An attachment of coal merely by leaving a copy in the town clerk's office, in the return of which the only description of the property attached is "all the coal in the town of B," is invalid. *Paul v. Burton et al.*, 148.

2. But still one who has receipted to the officer a definite quantity of coal which the latter has actually taken possession of under such an attachment, will be bound to return it to respond to the judgment. *Id.*

3. The charges of an officer for keeping property, which he has attached, during the pendency of the action under which the attachment was made, constitute a lien upon the property, which must be satisfied before the proceeds of the sale of the property are applied upon the execution; and it is not necessary, in order to preserve this lien, that these charges should be taxed as costs and included in the execution. *McNiel v. Bean*, 429.

4. But this priority of lien extends only to the avails of the property itself, which is so kept; and an officer is not justified in applying to the satisfaction of such untaxed charges, in preference to the payment of the execution, money which he receives from one who has become recognized to the plaintiff for costs, and who makes such payment in satisfaction of his liability under such recognizance. *Id.*

5. When property in the possession of a third party is assigned, mere notice, from the assignee to such third party, of the assignment is not sufficient to prevent its attachment upon process against the assignor. *Rice et al. v. Courtis*, 460.

6. It seems to be indispensable in order to remove the liability of property so situated to attachment as the property of the assignor, that the assignee should make the person, having it in his possession, his bailee; that the latter should consent to hold the property for the assignee. This consent would undoubtedly be inferred from the silence of the bailee upon a request being made upon him by the assignee to keep it for him. *REDFIELD*, Ch. J. *Id.*

7. The right to attach personal property which has been transferred without a compliance with the rule of policy of this State, requiring a change of possession, is not confined to the mere creditors, in a technical sense, of the vendor; but it belongs to all those who seek to enforce any right or claim against him by means of this process of attachment. *Id.*

8. M., an authorized person, attached upon a writ in favor of G. against B., the latter's cord wood, by leaving a copy of the writ in the town clerk's office, and subsequently took the defendants' receipt for the wood, which was disposed of by them for B.'s benefit. After the attachment by M., but before this receipt was executed, G., as deputy sheriff, attached the same cord wood in the same manner upon a writ against B. in favor of another person. The suit of G. v. B. resulted in a judgment for G., and the execution thereon was placed in M.'s hands for collection in season to charge the property attached. *Held*, that such attachment by G. did not discharge the defendants' liability on their receipt to M. *Mason v. Whipple et al.*, 554.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS 3; CONFLICT OF LAWS 1, 2; HUSBAND AND WIFE 2; TRUSTEE PROCESS.

AUDITOR, *See* CORPORATIONS 1; SUPREME COURT 1, 2.

AWARD, *See* ARBITRATION AND AWARD.

BANK DIRECTOR, *See* PRINCIPAL AND AGENT 2.

BASTARDS.

Illegitimate children do not inherit from legitimate children of the same mother. *Bacon v. McBride*, 585.

BASTARDY.

The 11th section of chap. XXXI, of the Comp. Stat., p. 243, authorizing the supreme or county court, in case of the loss of the writ and declaration in any action therein pending, to order a new declaration to be filed, does not apply to a prosecution for bastardy, where the original complaint, justice's record and warrant are lost. *Bingham v. Marcy*, 278.

See ILLEGAL CONTRACT.

BETTERMENTS, See HUSBAND AND WIFE 2.

BOND.

It is not essential to the maintenance of a suit upon a bond taken to the probate court, that a copy of the bond, and the certificate of leave from the probate court to prosecute it, should be filed in the county court at the same time when the writ is returned there. The county court may, in their discretion, allow them to be filed at any time during the first term, and the exercise of their discretion in this respect is conclusive. *Probate Court v. Niles et al.*, 775.

See ASSUMPSIT 3; CONSTRUCTION; TROVER 5, 6.

BOOK ACCOUNT.

1. The omission in a county court writ, on book account, in which the *ad damnum* is stated at one hundred dollars, to aver that the debit side of the plaintiff's account exceeds that sum will not invalidate a judgment for the plaintiff rendered without any objection from the defendant on that ground, if it appear from the whole record that the debit side of the plaintiff's account exceeded one hundred dollars. *Paul v. Burton et al.*, 148.

2. The facts in this case held to constitute a sale of goods from the owner to the bailee, having them in charge, and to render the latter liable to the former for their price in an action of book account. *Jones & Tibbets v. Hard*, 481.

3. If in an action of book account, appealed from the judgment of a justice of the peace, the debit side of the plaintiff's book, and of his account presented before the auditor, is less than one hundred dollars, the jurisdiction of the court is not defeated by the fact that the auditor adopts such a mode of stating the accounts as swells the debit side of the plaintiff's account to more than one hundred dollars. *Mason v. Hutchins & Co.*, 781.

See CORPORATIONS 1; JUDGMENT 2.

CASE, See ACTION 1.

CASES OVERRULED, DOUBTED OR EXPLAINED.

Barber v. Britton & Hall, 28 Vt. 112, questioned in *Pratt v. Page et al.*, 13; *Lowell v. Edgell*, 4 Vt. 405, explained in *Root v. Reynolds*, 139; *Butes v. Downer*, 4 Vt. 178, explained in *Paul v. Burton et al.*, 148; *Hodges and wife v. Green*, 28 Vt. 358, explained and limited in *Ballard v. Bond*, 355.

CHANCERY.

1. H. purchased and paid for land of which he took and kept the open and public possession, but the deed was taken in the name of F. E., an attorney, having demands in his hands against H. for collection, inquired of the latter if he owned the land, and he replied in the negative. Subsequently E., having received a demand against F. for collection, and desiring to secure it by an attachment of the same land, inquired of H. if he owned it, and received the same reply, but he did not disclose to H. his purpose in making the inquiry, and intended not to do so. E. then caused the land to be attached and levied upon as the property of F. *Held*, that the possession of the land by H. was sufficient notice of his equitable interest therein to put the creditors of F. upon inquiry before attaching it; and that under the circumstances, the last inquiry by E. of H., in regard to the title of the land, was not properly made, and that H.'s answer did not rebut the presumption of notice of his equitable interest raised by his possession of the land. *Hackett v. Callender et al.*, 97.

2. When a person is inquired of as to a matter in respect to which his answer may affect his pecuniary interests, he has a right to know whether the person making the inquiry has an interest which entitles him to make it, and what the object of the inquiry is, and that his answer will be relied upon. Unless correctly informed upon these points his answers will not affect his legal rights or pecuniary interests. *Ib.*

3. If an attaching creditor has notice after his attachment but before levy, that the land attached does not belong to the debtor, but to another person, though the record title is in the debtor, such notice, if true, will be sufficient to protect the equitable interest of the real owner against the levy. *Ib.*

4. When the invasion of a right in the use of a watercourse is threatened and intended, which is necessarily to be continuing and operative prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the appropriate remedy is by a bill in chancery praying for an injunction against such invasion, on the ground that it will cause irreparable injury to the orator. *Lyon v. McLaughlin*, 423.

5. The uncertainty of the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation, render such injury *irreparable*, in a legal sense; and therefore a court of equity will entertain jurisdiction of such a bill, and grant the proper remedy, notwithstanding the respective rights of the parties to the use of the water are in dispute, and depend entirely upon the legal construction of their title deeds. *Ib.*

6. The settlement of a controversy as to the character and extent of the respective rights of tenants in common, and as to the proper mode of exercising and enjoying them, is a proper subject of chancery jurisdiction. *Ib.*

7. A court of chancery will not interfere to set aside a judgment or execution merely on the ground of a technical informality, even though such objection is so serious that a court of equity could not relieve the other party from its legal consequences. In cases of such defects equity generally refers both parties to their legal rights and remedies. *Shedd & Co. v. Bank of Brattleboro*, 709.

8. The orators prayed the court to set aside an execution in favor of the defendants against a firm (against whom the orators had a claim and a subsequent attachment to that of the defendants) on the ground that the defendants' writ was returnable to an incorrectly designated term of court, and because the orators' execution was taken out by them against all the members of the firm, upon a confession of judgment by only one of them. *Held*, that these causes were insufficient to justify any interference with the execution by a court of equity. *Ib*.

See MARSHALING.

CHARGE TO JURY, *See* JURY.

CHOSE IN ACTION, *See* ACTION 4; HUSBAND AND WIFE 1; TRUSTEE PROCESS 9, 10.

CITATION, *See* OFFICER 1, 2.

CLAIMANT, *See* TRUSTEE PROCESS 1, 5, 6, 7.

COMITY, *See* ASSIGNMENTS FOR THE BENEFIT OF CREDITORS 4; CONFLICT OF LAWS 1, 2.

COMMON, *See* HIGHWAY 4, 5, 6, 7, 8.

COMMON CARRIER.

1. If a carrier refuse to deliver goods to the owner without the payment of money which he has no right to demand, and the latter, for the purpose of obtaining his property, pay under protest the sum illegally demanded, he may recover it back. *Beckwith v. Frisbie & Sons*, 559.

2. The defendant, a private carrier, contracted late in the fall to transport by canal boat a cargo of oats for the plaintiff from Burlington to New York. The parties both expected that the boat would reach New York that fall but owing to the lateness of the season, and without any fault on the part of the defendant, the boat was frozen in the canal, and was obliged to lie there all winter. It was necessary for the safety of the boat and cargo that the oats should be taken from the vessel and stored during the winter, and the defendant accordingly procured this to be done. At the opening of navigation in the spring the oats were reloaded and the cargo was delivered at New York. *Held*, that the defendant was entitled to recover of the plaintiff the expense of unloading and storing the oats during the winter. *Ib*.

3. A box of goods marked and directed to B., at Boston, was delivered by B.'s agent, at Saratoga Springs, to a railroad company, to be transported over their road on its way to Boston. The defendants gave a receipt therefor in these words: "Received, Saratoga Springs, September 17, 1855, from B., in apparent good order, one Box, to forward to Castleton, for B., Boston, Mass., at freight of — per 100 lbs. weight." It appeared that Castleton was the terminus of their road toward Boston, and that with the Rutland and Washington Railroad, with which it connected at Castleton, and other roads, a line of railroad communication was formed between Saratoga Springs and Boston.

Held, that the defendants were only liable for the safe delivery of the box of goods at the end of their own road in Castleton, and that it was their duty there to deliver it over to the railroad forming the next link in the chain in the line to Boston; and that it was sufficient to establish, *prima facie*, a right of recovery on the part of B., in an action on the case against the defendants, for negligence as common carriers, for the loss of the box of goods, to show its delivery to them, and that it had not arrived at Boston, and was lost. *Brintnall v. S. & W. R. R. Co.*, 665.

COMMON, TENANTS IN, *See* TENANTS IN COMMON.

COMPOSITION OF DEBTS.

1. Where a composition agreement between a debtor and his creditors contains a provision that all the creditors shall become parties to it, if any of the creditors do not join in it, it is void as to all. *Cobleigh v. Pierce*, 788.

2. *It seems* that if the creditor, whose signature was not procured to the contract, held security for the whole of his debt, that fact would create no exception to the above rule. *Ib.*

3. Where the debtor fails to pay or secure to a creditor, who is a party to the agreement, the stipulated percentage of his debt within the time specified therefor in the contract, the creditor may avoid such contract or agreement and insist upon payment in full. *Ib.*

4. If a creditor signs the agreement as to a part only of his debt, (such part being set down therein as his whole debt,) and that only upon the private promise of the debtor to pay him the balance in full, and the debtor has actually paid him this balance before settling with another creditor who is a party to the composition agreement, the latter would be justified in refusing to comply with the agreement, and evidence to prove these facts should be admitted. *Ib.*

5. If a creditor unqualifiedly surrenders the promissory note which he holds for his debt, and accepts the per centage of it stipulated in the composition agreement, after the expiration of the time limited therein for its payment by the debtor, or with knowledge that all the creditors had not joined in the contract as provided by its terms, or that one of the creditors had signed it as to a part only of his debt, under such circumstances as to amount to a fraud on the other creditors who are parties to it, such surrender and acceptance will operate as a waiver of the right of the creditor, so receiving the stipulated portion of his debt, to avoid the agreement on either of those grounds respectively, and he can not afterwards avail himself of that right for any purpose. *Ib.*

6. The plaintiff's evidence tended to show that when she, being one of the creditors and a party to the composition agreement, received from the debtor an amount of money equal to the stipulated percentage of her debt, and delivered to him the promissory note evidencing the debt, she declined to surrender it except upon a promise made by the debtor to pay or secure the balance of the note in full, which promise he accordingly made. *Held*, that this evidence

was admissible upon the question of waiver, and that it was a question of fact for the jury to determine, whether she had waived her right in the premises to refuse to carry out the composition agreement. *Ib.*

CONFESSIONS.

1. In criminal prosecutions, if the government introduce as evidence against the respondent, a statement of his in regard to his connection with the crime or the subject of the crime, the respondent is entitled to have the whole of such statement disclosed to the jury. The jury, however, are not bound to give equal credit to the whole statement, but it is for them to decide how much of it, under all the circumstances of the case, they will believe. *State v. Mahon*, 241.

2. In important criminal trials, when the prosecution resorts to the confessions of the respondent as evidence against him, great care should be exercised by the court, lest, either in the mode of obtaining the confession, or the use made of it, injustice be done to the accused. His whole statement, embodying the confession should be taken together, and all parts of it, both the exculpatory and the inculpatory portions, should be treated alike, except such as are disproved by the other evidence, or their own innate improbability or inconsistency. *State v. McDonnell*, 401.

CONFESSION OF JUDGMENT.

1. One partner alone can not legally confess judgment against the firm. *Shedd & Co. v. Bank of Brattleboro*, 709.

2. *It seems* that in the case of a judgment so rendered upon such a confession, the officer, holding the execution issued thereon, will not, as against subsequent attaching creditors of the same property, be justified in paying over to the creditors in the confession the avails of the property attached by him upon the process on which such confession was rendered. *Ib.*

CONFLICT OF LAWS.

1. The local rule of policy established in this State, requiring a complete change of possession, in cases of the transfer of personal property, in order to exempt it from attachment upon process against the transferor, is universal in its application to all personal property actually within the State; and it therefore applies to and governs the transfer of such property, though it be owned by a resident of another State, and be there transferred in conformity with the laws thereof, which do not require such a change of possession to exempt such property from such attachment. *Rice et al v. Courtis*, 460.

2. The modification of this rule as applicable to property, which, at the time of the transfer, is in the hands of a third party, is as much a matter of local policy as the principal rule itself, and a full compliance with it is equally requisite, in all cases of the transfer of personal property within this State in the hands of a third person, to prevent its attachment upon process against the transferor. *Ib.*

See ACTION 4; ASSIGNMENT FOR THE BENEFIT OF CREDITORS 1, 2, 3, 4; PROMISSORY NOTES 5, 6.

CONSIDERATION. *See* CONTRACT 2; ILLEGAL CONTRACT; PROMISSORY NOTES 10.

CONSTABLE.

1. In order to enable a constable to recover against his town upon an agreement made under the provision of sec. 66, of chap. 15, of the Comp. Stat. p. 120, the breach alleged being the neglect of the town to give the plaintiff the collection of certain taxes, the declaration must fully and explicitly set forth a contract duly made by the town with the plaintiff to give him the collection of such taxes. *Cameron v. Walden*, 323.

2. The declaration in this case adjudged insufficient in this respect. *Ib.*

CONSTRUCTION.

If the name of a person in a written instrument is wrong, or applies to a wrong person, the court will correct it by construction, when it is apparent upon the face of the instrument that the error exists, and in what manner it should be corrected to carry out the intention of the parties. *Richmond v. Woodard et al.* 833.

See WATER PRIVILEGE.

CONTEMPT OF COURT.

1. A court, which has power to punish for contempt, is the exclusive judge whether misbehavior in court amounts to contempt or not; and the exercise of such power in such cases cannot be revised by any other tribunal. *In re Cooper*, 258.

2. Justices of the peace while holding courts have power to punish for contempt. *Ib.*

3. A misapprehension as to the power of a justice of the peace to punish for contempt of court, on the part of one guilty of such an offence, does not furnish sufficient ground for his relief from punishment for such contempt by the supreme court under the provisions of the act of 1855, No. 7, p. 11. *In re Cooper*, 258.

4. One is guilty of a contempt who, in the presence of a court, assails its decisions with sneers, sarcasm or irony. *Ib.*

See PROBATE COURT, 1, 2, 3.

CONTRACT.

1. The defendant purchased goods of the plaintiffs, each party supposing that a credit of six months was given, but this supposition rested on the mutual but erroneous belief that the credit of a third party had also been pledged for the purchase. *Held*, that the vendors could not on the discovery of the mistake as to the liability of the third party, treat the sale as one for cash, and maintain an action in book account or assumpsit for the price of the goods, before the expiration of the six months. *Thayer & Co. v. Ballou*, 234.

2. Several persons, not partners, were jointly indebted to K., and three of them executed a written promise to the others that if the latter would pay K. the whole of his claim they would settle with them for their share. This promise contained no distinct words indicating a several liability on the part of the promisors. Those to whom this promise was made paid K. his whole claim, and afterwards brought assumpsit against the others, declaring upon their promise. The declaration contained no allegation that any balance had been struck or agreed upon as the share of the defendants, but merely alleged that their share was a certain sum. *Held*, on demurrer to the declaration, that the promise of the defendants to the plaintiffs was a joint, and not a several one; that it was based upon a sufficient consideration; and that the parties did not stand in such relations to each other as rendered it necessary to aver that any balance had been agreed upon as the defendant's share of the debt. *Scott et al. v. Keith et al.*, 268.

3. In the case of a contract to deliver at a future day, at a certain price and place, property not in *esse* when the contract is made, but to be produced by the cultivation of the earth, and to be of a specified character and description, the property does not pass to the vendee by its mere delivery at the appointed time and place, and its tender to him, if he refuse to accept it. *Rider v. Kelly & Roberts*, 268.

4. In such cases the rule of damages for the breach of the contract by the vendee in refusing to receive the property, is the difference between the contract price and its market value at the time of delivery. *Id.*

See ACTION 2, 3; CORPORATIONS 1; EVIDENCE 2, 3; DAMAGES 1, 2, 3; RAILROADS 6, 7, 8, 9, 10, 11; RESCISSION OF CONTRACTS.

CORPORATIONS.

1. S. contracted with the defendants to build their railroad and bear all the expenses of litigation growing out of its construction, and it was agreed that he might use the defendants' name in all necessary litigation. H., one of the defendants' directors, of which there were five, was also the agent of S., in relation to the execution of this contract. The plaintiffs not being aware of any agreement that S. was to bear the whole expense of the litigation, by the employment of H., rendered professional services, as attorneys, in a suit against S. by a rival corporation, in which, however, the defendants were really interested, and charged their services to the defendants. This charge constituted the first item of the plaintiffs' account. The remaining items were for professional services rendered in a suit brought by the plaintiffs in favor of H. against the same rival corporation, which suit was brought after consultation by the plaintiffs with H. and the two other managing directors of the defendants, and with their approval, but nothing was said respecting to whom charges were to be made therefor. The object of this suit was to protect the defendants' interests, but the two other directors, participating with H. in the consultation with the plaintiffs, which resulted in bringing the suit, though aware of this fact, still supposed that the plaintiffs' services were to be rendered entirely upon the credit of S. These services were originally charged by the plaintiffs to H. No action was ever taken by the board of the defendants' directors in regard to the employment of counsel for the defendants. The auditor allowed

the whole of the plaintiffs' account, and reported the foregoing facts in regard to it. *Held*, that as to the first item, the plaintiffs were authorized to consider themselves employed by the defendants, and to charge it to them, as they did; and in regard to the remaining items, the supreme court held that the same authority existed, and, notwithstanding the original charge of them to H., construed the report as intending to state that the services were rendered on the credit of the defendants, and therefore rendered judgment for the plaintiffs for their whole account. *Foot & Hodges v. R. & W. R. R. Co.*, 633.

2. Corporations are bound by the acts of their servants and agents, within the ordinary line of their duty, without any formal vote conferring such authority; and the action of their directors, though acting separately, if in the usual sphere of directors, is binding upon the corporation. *Ib.*

See QUO WARRANTO.

COSTS, *See* ARBITRATION AND AWARD 1, 2, 3; QUO WARRANTO 2.

COUNTY COURT, *See* BASTARDY; EXECUTION 1.

CREDIT, *See* ACTION 8.

CREDITORS, *See* ATTACHING CREDITORS; COMPOSITION OF DEBTS.

CRIMINAL LAW.

1. In an indictment under the 4th section of chapter 104, page 545, of the Compiled Statutes, it is not necessary to a conviction that any portion of the building should be actually burned. It is sufficient if fire be applied to or in immediate contact with the building, with the intent to burn it, though such intent be not carried out. *State v. Dennin*, 158.

2. It is an offence under the statute against breaking open a jail, (Comp. Stat., chap. CVI, sec. 11, p. 555,) for a prisoner confined alone in jail to break it open that he may escape. *State v. Fletcher*, 427.

3. If one hire a horse of another, under the pretence that he wishes him only for a temporary purpose, when in fact he designs wholly to deprive the owner of him, and he actually does put the horse to a different use from that for which he hired him, it is larceny, even though he do not sell or dispose of the horse. *State v. Humphrey*, 589.

4. *It seems* that the obtaining of the horse under such false pretences, with the design of stealing him, is in itself larceny. *Ib.*

See ABORTION; ACCOMPLICE; ASSAULT WITH INTENT TO COMMIT RAPE; CONFESSIONS; EVIDENCE 1, 4, 5, 6, 7; JURY 1, 2; MANSLAUGHTER; MURDER.

DAMAGES.

1. In an action for a false warranty of the soundness of certain sheep sold by the defendant to the plaintiff, the declaration alleged special damages by reason of the communication of disease from the sheep sold, to other sheep of

the plaintiff. *Held*, that it was not necessary, in order to recover such special damages, to allege or prove that the defendant knew at the time of the warranty that the plaintiff intended to mingle the sheep purchased with his other sheep. *Packard v. Slack*, 9.

2. The defendants contracted to deliver the plaintiff a certain quantity of oats in the month of January following at a certain price, for which the plaintiff paid them in full in advance. The defendants delivered a portion of the oats in January, and it was then agreed by the parties that the defendants need not deliver the remainder in that month provided they would deliver them as fast as the plaintiff should want them. The defendants accordingly delivered oats to the plaintiff during the following spring and summer until July, when they declined furnishing the remainder due under the contract. The price of oats remained the same from the time of making the contract until through January, but advanced between that month and July. The plaintiff brought assumpsit against the defendant, declaring on the contract as originally made, and setting forth as a breach the non-delivery of the oats in January, and claiming only general damages. The declaration also contained the common counts; *Held*, that under this declaration no higher measure of damages could be recovered than such as resulted from the non-delivery in January, and that in order to recover the advance in price between January and July, the declaration should set forth the enlargement of the contract. *Hill v. Smith & Carpenter*, 433.

3. In an action for the breach of a contract for the sale and delivery of an article, the measure of damages is its market value at the time stipulated for its delivery, and this rule is not varied by the payment of the price in advance. *Id.*

See CONTRACT 4; SLANDER 2; TROVER 2, 3, 4, 6.

DAMNUM ABSQUE INJURIA; *See* ACTION 1.

DEBTOR AND CREDITOR; *See* COMPOSITION OF DEBTS.

DEDICATION; *See* HIGHWAY 4, 5, 6, 7, 8.

DEED; *See* ESCROW 1, 2, 3; PRESUMPTION; SERVITUDES; WATER PRIVILEGE 1.

DEPOSITION.

The only notice which the defendant received of the taking of a deposition offered by the plaintiff on trial, was by a citation signed by the justice who took the deposition, naming the time and place of taking, and served on the defendant by the officer, to whom it was directed, merely by reading. *Held*, that this was not a sufficient service of the citation, and that the deposition was not admissible. *Fitts v. Whitney*, 589.

2. It seems that the personal notice of the taking of a deposition, which the statute provides may be given to the adverse party by the magistrate taking the deposition, must be given by the magistrate himself, *visu voce*, in the presence and hearing of the party to be notified.—*REDFIELD*, Ch. J. *Id.*

3. B. was duly notified to be present at the taking of depositions on behalf of an adverse party, and was present, by his attorney, at the appointed time and place, when the deposition of M. was taken, pursuant to the notice, the adverse party appearing only by P. by whom the examination was conducted in its behalf, and who was not its attorney of record in the cause in which the deposition was to be used. Immediately at the close of taking it, a duplicate of the deposition was taken by the same magistrate, to be used in the same case, at the request of B., P. being verbally notified by the magistrate and present, but declining to appear or act in behalf of the adverse party upon the taking of the duplicate deposition, or to consent that B. might have the benefit of the original; *Held*, that the notice of the taking of the duplicate deposition was not sufficient under the statute, (No. 4, of 1854,) and it was therefore inadmissible. *Brintnall v. S. & W. R. R. Co.*, 665.

See OFFICER 1, 2.

DISTRICT SCHOOLS.

1. A requirement by the teacher of a district school, that the scholars in grammar shall write English compositions, is a reasonable one; and if such scholar, in the absence of any request from his parents that he may be excused from so doing, refuse to comply with such a requirement, he may be expelled from school on that account. *Guernsey v. Pitkin*, 224.

2. It seems also that such requirement would be reasonable and proper in the case of the scholars in a majority of the studies prescribed for district schools by the statute. *Redfield*, Ch. J. *Ib.*

EASEMENT, *See* RAILROADS 3.

EJECTMENT, *See* PRESUMPTION 2, 3, 4; RAILROADS 3

ELECTIONS, *See* ILLEGAL CONTRACT 4, 5, 6, 7.

ESCROW.

1. A deed deposited by the grantor with a third party, to be held by him and not delivered to the grantee until some other thing is done, will have no validity until the performance of such condition, even though the depository in fraud of the grantor, deliver it to the grantee, who takes it in good faith and in ignorance of any condition imposed upon its delivery, and advances a valuable consideration for it. *Smith et al. v. South Royalton Bank et al.* 341.

2. The recording of such a deed by the consent of the grantor will not render it binding upon him in the case of such a fraudulent delivery of it by the depository to a *bona fide* grantee, if the grantor consented to such recording with the express understanding that the depository should still retain the deed after it was recorded until the performance of the condition upon which it was to be delivered. *Ib.*

3. The orators deposited a mortgage executed by them with R., to be held by him as an *escrow* until a bond of indemnity from P. should be furnished them by T. R. delivered the mortgage to the grantee without T's having furnished such a bond, and without the orators' knowledge, the grantee, however,

being ignorant of any condition as to its delivery and taking it in good faith and for value; *Held*, that the fact that after the orators became aware of the unauthorized delivery by R. of the mortgage, they expressed to P. a willingness to take, and a desire that he should furnish them, a bond of indemnity from B. in the place of that of P. and also that they neglected for two months after they ascertained that the mortgage had been improperly delivered by R., to notify the holder of it that they claimed it to be invalid, did not amount to a ratification of its delivery by R. *Ib.*

ESTATES, SETTLEMENT OF, *See* SETTLEMENT OF ESTATES.

ESTOPPEL, *See* [CHANCERY 1, 2; PARENT AND CHILD 2, 3.

EVIDENCE.

1. On the trial of an indictment for a crime, the respondent, to weaken the force of the evidence of certain witnesses who had testified to his identity with the criminal, introduced evidence tending to show that at a preliminary examination of the respondent they testified less positively on that point; but it also appeared that the same witnesses, directly after the commission of the offence, asserted positively the identity of the respondent with the person whom they saw commit the offence, and at the same time caused his arrest; *Held*, that such statements and action on the part of the witnesses, so near the time of the commission of the offence, tended to corroborate their testimony as to identity. *State v. Dennin*, 158.

2. Where it is satisfactorily shown that, for any reason, the parties to a contract did not intend to reduce the whole of it to writing, and the portion omitted is not inconsistent with the written portion, the part omitted may be proved by parol evidence. *Winn v. Chamberlin*, 318.

3. The fact that one has executed to another a receipt, not under seal, for a sum of money, and has added in the receipt that in consideration of such payment he discharges the other from a certain claim, does not prevent the latter from showing by parol evidence that the same payment was made in consideration of the discharge of another claim, as well as of that specified in writing. *Ib.*

4. Where the fact of a deceased party's going to the respondent's house for the purpose of having him procure an abortion upon her person, was material, it was held that the declarations of such person as to her purpose in going there, made at the time of her departure for that place, were competent evidence as part of the *res gesta*. *State v. Howard*, 380.

5. The question whether statements, offered as *dying declarations*, are admissible as such, is to be decided solely by the court. *Ib.*

6. The state of health or feelings of a person, when material, may be proved by such person's statements in regard to them made at the time. *Ib.*

7. When testimony is admitted upon the representations of counsel that it will be connected with additional evidence so as to render it material, and this representation fails to be fulfilled, the court, in their charge to the jury, should expressly direct them to exclude such testimony entirely from consideration. *State v. McDonnell*, 491.

8. In actions against towns for injuries alleged to be sustained in consequence of the insufficiency of a highway, evidence of the effect on carriages driven by other persons than the plaintiff, over the same road, has a tendency to show its fitness or unfitness for public travel, and is therefore competent, whether such carriages are like that driven by the plaintiff, or not, and notwithstanding no evidence be given as to the rate of speed, or degree of care with which they were driven. *Kent v. Lincoln*, 591.

9. One who has brought an action for personal injuries may prove, as tending to show their nature and extent, his own statements made, while suffering under such injuries, to an examining physician in regard to his inability to move certain portions of his frame, and the pain produced by other motions, notwithstanding such examination was made by the physician after the commencement of the suit, and with a view of being a witness at the trial in regard to the character of the plaintiff's injuries. *Id.*

10. If, in the close, the plaintiff introduce proof of a new and distinct fact, not fairly notified to the defendant by the opening proof, so as to enable him to answer it in his general evidence, he must be allowed to answer or contradict it afterwards, and it is error for the court to refuse him the opportunity to do so. *Id.*

11. An association of individuals in trade, under the name of the New England Protective Union Division No. 230," brought an action for slander against H. On the trial, H., for the purpose of proving that B., one of the plaintiffs of record, was not a member of the association, offered in evidence a written admission to that effect, drawn up by H's. attorneys in the case, signed and sworn to by B. Held, that it was admissible. *Smith et al. v. Hollister*, 695.

12. The plaintiffs to rebut evidence introduced by the defendant tending to prove that W., another of the plaintiffs of record, was not a member of the association, offered a paper signed by the wife of W., in his name; it did not appear that it was signed by her with the assent or knowledge of W., her husband, though it did appear that when the paper was first drawn, W., refused to sign it. This paper, it appeared, was used by her for the purpose of withdrawing from the association the eight dollars (the sum required to be paid by members on joining it,) which she had previously paid in, and with it an order was obtained for the withdrawal of the money; Held, that the paper was inadmissible. *Id.*

13. The plaintiff sued the town of Norwich to recover back certain taxes paid by him, in the years 1848 to 1854 inclusive, on a school lot leased to and occupied by him, which was by statute exempt from taxation. The defendant pleaded the general issue and the statute of limitations. To the latter plea the plaintiff replied a new promise, and, to prove it, introduced in evidence a copy, from the town records, of a vote of the town, passed at an adjourned March meeting in 1855, as follows: "On motion, voted that the matter of Lorenzo Slack, relative to his having been taxed on more land than he actually possessed, be referred to the selectmen." The plaintiff then offered to prove by parol that at the same meeting a motion was made and carried in the affirmative by vote of the town, as follows: "that the matter of Lorenzo Slack

against the town of Norwich, be referred to the selectmen to go to the records and find what was due Mr. Slack, and draw an order in his favor on the treasury for that amount." *Held*, that the testimony offered was inadmissible for the reasons, first, that parol evidence of the vote offered to be proved could not be received until it was shown, either that the vote had not been recorded or that the record of it was lost or destroyed; and, second, that record evidence of a vote of a similar character, passed at the same meeting, had already been introduced by the plaintiff, which, in the absence of proof to the contrary, would be presumed to be the same vote as that of which the parol proof was offered, and the record of the vote could not thus be varied or added to by parol. *Slack v. Norwich*, 818.

14. When it is apparent that certain evidence, introduced under objection, had no effect upon the verdict, the propriety of admitting the evidence will not be considered by the supreme court. *Ib.*

See COMPOSITION OF DEBTS 4, 6; CONFESSIONS 1, 2; PRESUMPTION 3, 4, 5, 8, 9, 10; RAILROAD 8, 9, 10; REFERENCE 2; SCHOOLMASTER 4, 5, 7, 8.

EXCEPTIONS.

1. Issues and questions of law arising upon the trial of a writ of *habeas corpus* before the county court, may be passed to the supreme court upon exceptions. *In re Cooper*, 253.

2. When a case passes to the supreme court upon exceptions, error must be shown by the exceptions, or the judgment below will stand. *Bartlett v. Wood and trustees*, 372.

EXECUTION.

1. The Chittenden county court, at the November Term, 1857, on the 7th of December took a recess or adjourned, for the purpose of completing the business of its session, until the 21st of December, when it reassembled and continued its session until the 24th of the same month, when it finally adjourned. On the 7th of December an order was made by the court that executions on judgments in trials completed might issue as of date of December 8th; *Held*, that in order to preserve the lien of attachment on personal property, it was sufficient to put the executions into the hands of the officer making the attachments at any time within thirty days after the 25th of December, and that it was immaterial in this respect whether the judgments were completed before the 7th of December or not. *Paul v. Burton et al.*, 148.

2. In an action brought by the trustee process if judgment be rendered against the principal debtor and one of the trustees be adjudged chargeable, and execution thereupon issue against such trustee, and the action be continued as to the other trustee, the execution so issued is so far valid that an officer in whose hands it is placed for collection, is liable for neglecting to levy and return it. *Passumpsic Bank v. Beattie*, 315.

See CHANCERY 3; RAILROADS 3.

EXECUTORS AND ADMINISTRATORS.

1. The widow of an intestate petitioned the probate court to assign her so much out of the estate, as she was entitled to for her maintenance during its settlement. The probate court assigned her absolutely eight hundred dollars in money, and the use of the real estate and household furniture during the settlement of the estate. This assignment was not appealed from; *Held*, that under this decree the administrator was entitled to be allowed, in the settlement of his account a charge of eight hundred dollars paid by him to the widow for her support. *Richardson, Admr. v. Estate of Merrill*, 27.

2. *Held*, also, that the fact that such assignment to the widow was an extravagant or unreasonable one, did not affect its validity, so long as it was unappealed from, and that it could not be revised in a collateral proceeding like the settlement of the administrator's account. *Ib.*

3. In the settlement of an administrator's account, he is entitled to be allowed for money paid by him in liquidation of a claim which could have been enforced against him either at law or in equity. *Ib.*

See PROBATE COURT 1, 2, 3; *TRUSTEE PROCESS* 9, 10.

FIXTURES.

1. Machinery in a blacksmith's and wagon maker's shop, which, though fastened to the building, was only so attached for the purpose of making it firm for use in its place, and which could be removed without seriously injuring the building, said machinery consisting of a boring lathe, an engine lathe, a wood turning lathe, a press drill, a press punch, an upright saw, and a circular saw, all being propelled by water, *held* to be personal property and not fixtures, and as such liable to attachment by the trustee process. *Bartlett v. Wood and trustee*, 372.

2. The doctrine of the cases of *Hill v. Wentworth*, 28 Vt. 428, and *Fullam et al. v. Stearns et al.*, 30 Vt. 443, in regard to fixtures, reaffirmed. *Ib.*

FORCIBLE ENTRY AND DETAINER, *See TRESPASS* 1, 2.

FRAUD, *See RESCISSION OF CONTRACTS* 2, 3, 4.

FRAUDS, STATUTE OF.

1. A purchaser of land under a verbal contract, who has made a partial payment therefor under such contract, and has entered into possession by the consent of the vendor, has such an equitable interest in the land that he may lawfully sever timber from the freehold or peel bark from the trees thereon; and such timber and bark, when so severed from the freehold, becomes in law the property of the purchaser, and is subject to attachment and execution at the suit of his creditors. *Admr. of Pike v. Morey*, 37.

2. The plaintiff and the defendant made a parol contract that the former should convey to the latter a farm for a certain price, and that if the plaintiff could within a year find a purchaser at a higher price, the defendant should convey the farm to such purchaser, and that the plaintiff should have one-half

the gain so made. The plaintiff conveyed the farm to the defendant and received payment therefor. Within the specified time he found a purchaser at an advance, but the defendant would not convey to him. *Held*, that the contract was within the statute of frauds, being for the sale of lands, and that the plaintiff could not recover of the defendant for a breach of the contract in special assumpsit, nor in general assumpsit for his expenses and labor in finding such a purchaser. *Ballard v. Bond*, 355.

FRAUDULENT CONVEYANCE.

1. If one is so connected with the property of another, and the business in which it is used, that he honestly supposes it necessary for the preservation of his business interests to purchase it, and does purchase it for a full consideration for that reason, and with no intent to aid the seller in a fraud upon his creditors, the sale will be valid, so far as regards the purchaser, as against the creditors of the vendor, notwithstanding the purchaser knows that the object of the seller in making the sale is to defraud his creditors. *Root v. Reynolds*, 139.

2. But *aliter*, if the purchaser, with knowledge of the vendor's fraudulent intent, be a mere volunteer in the purchase, and buy the property simply because he can make a good bargain. *Ib*.

3. The doctrine of *Lowell v. Edgell*, 4 Vt. 405, in regard to fraudulent conveyances, considered and explained. *Ib*.

GRAND LIST.

The grand list of a town does not become the legal basis of taxation until a majority of the listers have signed and sworn to a certificate thereon, as required by section 33 of No. 47 of the acts of 1855, (see acts of 1855, p. 55) and by section 2 of No. 47 of the acts of 1856. (See acts of 1856, p. 52.) *Reed v. Chandler*, 285.

See SCHOOL DISTRICT 1.

GOOD FAITH, *See* LUNATIC 1; NEGLIGENCE 2; PROMISSORY NOTES 2, 3, 4.

HABEAS CORPUS.

A writ of *habeas corpus* cannot be issued by the clerk of the county or supreme court during vacation; and when issued in vacation it must be returnable forthwith, and not to a future term of court. *In re Cooper* 258.

See CONTEMPT OF COURT 1, 3; EXCEPTIONS 1; PROBATE COURT 1.

HIGHWAY.

1. The proper public authorities of a town or village have a right to place in a highway a reservoir for the purpose of retaining water to sprinkle the highway with; and the owner of the fee of the land, where such reservoir is placed, cannot maintain an action against such authorities for so doing. *West v. Bancroft*, 367.

2. Besides the use of highways for the sole purpose of travel, the public may use them for many other objects necessary for the public convenience and health, such as laying water pipes and constructing drains, sewers and reservoirs, etc. *PIERPOINT, J. Ib.*

3. In an action against a town for damage sustained through the insufficiency of a highway, the plaintiff need not aver in his declaration that he gave notice to the selectmen of such town of the injury and his intention to claim satisfaction therefor, as required by statute (Acts of 1835, No. 15, p. 18.) Such notice is no part of the cause of action, but pertains merely to the remedy and evidence. *Kent v. Lincoln, 591.*

4. The mere act of leaving land, between the owner's house or store and the highway, unenclosed, for the purpose of making access to such house or store more convenient, does not of itself constitute a dedication of the land to the public use. *Morse v. Ranno et al. 600.*

5. The omission to fence land adjoining the highway is no proof of an intent to dedicate it to the public. *Ib.*

6. But if the public appropriate it to their use, and continue to use it for the space of fifteen years or more, for the ordinary purposes of a highway, then they acquire the right so to use it. *Ib.*

7. When a highway is thus acquired by occupation, its extent must be determined by the extent of the actual possession and use. *Ib.*

8. Such possession and use by the public for a less period than fifteen years may be sufficient to show a dedication, where it is accompanied by other acts or circumstances proving an intent on the part of a donor or grantor to make such dedication. *Ib.*

See EVIDENCE 8.

HOMESTEAD.

A mortgage of a homestead executed by the owner thereof, who was a married man, his wife not joining in the same, contained, after the description of the premises, the following words: "*saving always the homestead exemption in the same.*" Held, that this reservation did not alter the construction of the mortgage, the effect of which so far as the husband was concerned, was after breach of condition, to pass the title to the whole premises, except the equity of redemption. *Jewett et al v. Brock et al., 65.*

HUSBAND AND WIFE.

1. The wife of the intestate received during coverture certain personal property by gift and inheritance, and also acquired some money by her own personal earnings. The intestate always regarded all this as his wife's separate property, and allowed her to treat and control it as such. The property was, during coverture, reduced to money, and all her money was then loaned and notes taken therefor in the husband's name, but they were always regarded and treated by him as her separate property, and she kept them in a separate parcel and room from those belonging to him. Shortly before the intestate's death, his wife being about to leave home temporarily, left her parcel of notes

in her husband's care for safe keeping, and they were found among his papers by his administrator, and inventoried by him as belonging to the intestate's estate, the widow, however, claiming them as her own.

Held, that as against the heirs of the husband, these notes were in equity the sole property of the wife, and the administrator was therefore allowed, in the settlement of his account, to credit himself with their full amount, which he had realized and paid over to the widow. *Richardson, Adm'r. v. Merrill's Est.*, 27.

2. Since the passage of the Married Woman's Act of 1847, Comp. Stat., p. 403, sec. 15, a husband has not, during his wife's life, an interest subject to attachment by his creditors, in the betterments made by him upon her land, by way of cultivation, or buildings in the ordinary course of occupancy, husbandry and improvement, or in the rent of such lands when leased under such improvements to a third party. *White v. Hildreth and Trustees*, 265.

See TRUSTEE PROCESS 9, 10.

ILLEGAL CONTRACT.

1. Mere knowledge by the vendor of goods sold in another State that the vendee intends to use them in violation of the laws of this State, is not sufficient to invalidate the contract, when sought to be enforced here. But if the vendor do anything with such knowledge, beyond the sale of the goods, in aid of the illegal design of the vendee, he cannot maintain an action upon his contract in the courts of this State. *Gaylord v. Soragren*, 110.

2. The plaintiff, being authorized to sell intoxicating liquors in the State of New York, sold some there to the defendant who resided here, and who intended to use them in this State contrary to law, and this illegal intent was known to the plaintiff. The liquors were delivered in New York to a carrier, designated by the defendant, to be transported to Vermont at the latter's risk. But at the defendant's request, and for the purpose of preventing the seizure of the liquor for a violation of our laws, the plaintiff marked the casks in a peculiar way, omitting the defendant's name. *Held*, that the plaintiff had so far participated in the defendant's illegal design that he could not recover the price of the liquor in the courts of this State. *Id.*

3. If a woman authorize her agent to settle a civil prosecution in her behalf for bastardy, and such agent settle it by taking a note to his principal, the consideration of which is not only the settlement of the civil complaint, but also the execution of a written agreement on the part of a woman not to instigate or testify in, any criminal prosecution against the defendant, such note is illegal and cannot be enforced, notwithstanding the agent exceeded his authority in making such agreement, and the woman signed the agreement without reading it, and supposing it to be merely a settlement of the civil suit. By accepting the note and putting it in suit, she is held in law to have ratified the acts of her agent. *Smith v. Pinney*, 282.

4. The defendant being indebted to the plaintiff, who was a candidate for the office of town representative, the parties agreed that the former should use his influence for the plaintiff's election, and do what he could for that purpose, and that if the plaintiff was elected, that should be a satisfaction of the plaintiff's claim. Nothing was specifically said about the defendant's voting for

the plaintiff, but he did vote for him, and would not have done so, nor favored his election, but for this agreement. The plaintiff was elected. No actual discharge of the debt was given by the plaintiff after the election. *Held*, that this agreement was entirely void, and constituted no bar to the plaintiff's recovery of his debt. *Nichols v. Mudgett*, 546.

5. It is not necessary to the invalidity of such an agreement that it should be secret, or stipulated to be kept secret. *Ib.*

6. If for money or other personal profit a voter agree so exert his influence in an election against what he believes to be for the public good, the agreement is void, even though in the exercise of such influence, he resorts to no unlawful means. *Ib.*

7. A note executed in consideration of the payee's agreement to resign public office in favor of the maker, and use his influence to secure the latter's appointment as his successor, is void, except in the hands of a *bona fide* holder. *Meacham v. Dow*, 721.

8. A contract made in this State for the purchase of spirituous liquors, contrary to the statute of 1846, (Acts of 1846, No. 24, p. 18,) the vendor having knowledge that the liquors were to be sold here by the vendee without a license, is illegal, under the act of 1846, No. 24, although the delivery of the liquors was made in another State, where the vendor resided and did business and where the sale would have been legal; and the fact that the promissory note for the price of the liquors was subsequently made in the latter State does not render the note valid, as between the original parties to it, or in the hands of any holder with notice of the illegality of the consideration. *Converse v. Foster*, 828.

9. But in the hands of an indorsee for value, who bought it before its maturity and without notice of any illegality in its consideration, the note is valid and collectible. *Ib.*

10. *It seems* that the rule would be the same under the act of 1852, in regard to traffic in intoxicating drinks. *POLAND, J. Ib.*

11. Illegality of consideration is no defence to a suit brought upon a note or bill by a *bona fide* holder for value, who obtained it while current and without notice of the illegality, unless the statute making the consideration illegal expressly provides that the contract shall be void. *Ib.*

IMPRISONMENT; *See* PROBATE COURT 1, 2, 3.

INFANT.

The fact that infants and married women own proprietary rights in townships does not prevent their being bound by the acts of the proprietors in making divisions at legal meetings, or by subsequent acquiescence in such a division. *Townsend v. Est. of Downer*, 183.

See ASSUMPSIT 1, 2; PARENT AND CHILD, 1, 2, 3.

INHERITANCE; *See* BASTARDS.

INJUNCTION; *See* CHANCERY 4, 5.

INSOLVENT LAWS OF ANOTHER STATE; *See* ACTION 4.

INTEREST.

It seems that in the case of a note executed and delivered in this State, there being no evidence of any particular place of payment being agreed upon or understood by the parties, the law of this State as to interest will govern, notwithstanding the payee is a non-resident. *POLAND, J. Churchill and Wife v. Cole et al.*, 93.

See USURY.

INTOXICATING LIQUORS.

1. A justice of the peace has no jurisdiction to try a prosecution under the ninth section of the act of 1872, for being a common seller of intoxicating liquor. *State v. Peck*, 172.

2. But the joinder of a count for being a common seller with other counts for selling intoxicating liquor in specific instances, in a complaint before a justice of the peace, will not render the whole complaint defective. The justice may try the respondent upon the counts within his jurisdiction to try, and examine and in his discretion discharge or bind him over to the county court upon the count for being a common seller. *Ib.*

3. The sale of liquors imported into this country in accordance with the laws of the United States, while remaining in the original packages in which they were imported, is not prohibited by the laws of this State regulating the sale of intoxicating liquor. *Jones & Tibbets v. Hard*, 481.

See ILLEGAL CONTRACT 1, 2, 8, 9, 10.

JOINDER OF ACTIONS.

1. A count in trespass for cutting down and carrying away a tree from the plaintiff's land, which commences like a count in trespass *qu. cl. fr.*, but concludes with an allegation that the trespass is "contrary to the statute in such case made and provided, whereby the plaintiff is entitled to recover of the defendant treble the aforesaid value of said tree, etc.," will be construed to be a count for the penalty prescribed by the statute, (Comp. Stat., sec. 32, p. 550,) and not a count in trespass at common law. *Keyes v. Prescott*, 86.

2. It is not competent for the county court to allow an additional count in trover for the tree to be filed to such a count upon the statute, either at common law or by virtue of the statute (Acts of 1856, p. 13,) which allows the joinder of counts in trespass and trover, if for the same cause of action. *Ib.*

3. *Quere*, whether if the original count were simply for trespass *qu. cl. fr.*, the new count in trover could be added? *BENNETT, J. Ib.*

JOINT TENANTS, *See* TRUSTEE PROCESS 5.

JUDGMENT.

1. Where a question is brought before a judicial tribunal having jurisdiction of the matter, and is there decided, the decision, in the absence of evidence to the contrary, must be presumed to be upon the merits of the controversy and a final settlement of it. *Stearns v. Admr. of Stearns*, 678.

2. The plaintiff, in an action on book account, presented before the auditor certain matters for adjustment and allowance which were passed upon by the auditor, apparently on their merits, and his report thereon was accepted by the court. The defendant declared in offset upon two promissory notes made by the plaintiff, to which the plaintiff pleaded payment. To support his plea, the plaintiff gave evidence tending to show a payment, but in no other manner than by the same matters which he had so presented before the auditor. *Held*, that the auditor's adjudication upon those matters was final and barred the plaintiff from applying them on the notes. *Ib.*

See BOOK ACCOUNT 1; CHANCERY 6, 7; CONFESSION OF JUDGMENT 1, 2.

JURISDICTION, *See* BOOK ACCOUNT 3; INTOXICATING LIQUOR 1; WILL 4.

JURY.

1. It is not error in a criminal cause, when the benefit of the rule is claimed that the jury are the judges of the law as well as the facts, for the court to charge the jury, in their own way, that this rule is not intended for ordinary criminal cases; that it is a matter of favor to the respondents, and should not be acted upon by the jury, except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court must be taken solely upon their own responsibility, and that the safer and better way, in ordinary criminal cases, is to take the law from the court, and that the jury are always justified in doing so. *State v. McDonnell*, 491.

2. The practice of courts of reading to the jury, in their charges to them, abstract legal principles from text books and reports, criticised. *Ib.*

See NEGLIGENCE 1; PARTNERSHIP 7; PRESUMPTION 4, 5, 8; PROMISSORY NOTES 2; RAILROADS 8.

JUSTICE OF THE PEACE.

While a justice of the peace is alive and continues to reside in the county for which he was appointed, he is the proper certifying officer of his own records, although he may be out of office. *Curruth v. Tighe*, 628.

See APPEAL 1, 2; BOOK ACCOUNT 3; CONTEMPT OF COURT 2; INTOXICATING LIQUOR 1; NEW TRIAL; REFERENCE 1, 2.

LARCENY, *See* CRIMINAL LAW 3, 4.

LIBEL.

The words, "he was married to a woman" (naming her) "and kept her till he got sick of her, and then sent her away, he having all this time two wives," amount to a charge of bigamy, and are libelous. *Parker v. Meader*, 300.

LIMITATIONS, STATUTE OF.

1. If a debtor die before the statute of limitations has run upon his debt, his death will at most only suspend the operation of the statute until two years after the grant of letters testamentary or of administration upon his estate, *Briggs v. Estate of Thomas*, 176.

2. The plaintiff's claims against the intestate, being on note and book account, matured in 1843. The intestate died in 1847, and administration was immediately taken on his estate, and commissioners appointed who made their report in June, 1848, the plaintiff having neglected to present his claims before them. The estate remaining unsettled, the plaintiff, in 1856, procured the probate court to open the commission for the receipt and examination of the plaintiff's claims. *Held*, that they were barred by the statute of limitations. *Id.*

3. An agreement by the maker of a promissory note, before the statute of limitations has run upon it, "that he will not take any advantage of the statute of limitations on the note," is an acknowledgement of the debt sufficient to take it out of the statute. *Stearns v. Admr. of Stearns*, 678.

4. Such agreement need not be pleaded by way of estoppel, but may be shown in evidence under a traverse of the plea setting up the statute bar. *Id.*

5. A proposition by a debtor to his creditor to pay a specific sum in compromise of a disputed claim, fixing a definite time for its acceptance, and providing that, if not accepted within that time, it shall go for nothing, is not sufficient to prevent the operation of the statute of limitations upon the claim. *Slack v. Norwich*.

6. So also of a proposition, not accepted by the creditor, to pay a definite sum in settlement of a disputed claim. *Id.*

See EVIDENCE 13.

LUNATIC.

1. If one contract with a lunatic, and under such contract furnish him money and render him services, which, however, prove of no benefit to him, he cannot recover of the lunatic therefor, even though he in good faith supposed him to be sane, provided the circumstances known to him in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on an inquiry by which he might, if reasonably prudent, have learned that fact. *Lincoln v. Buckmaster*. 652.

2. The liability of lunatics upon their contracts with parties ignorant of their lunacy discussed by REDFIELD, Ch. J. *Id.*

MANSLAUGHTER; See MURDER 2, 4, 5.

MARRIED WOMAN; See HUSBAND AND WIFE 1, 2; INFANT; TRUSTEE PROCESS.

MARSHALING.

1. G. mortgaged land to E. and subsequently conveyed a portion thereof to L., with the usual covenants of warranty, etc., and afterwards mortgaged the remainder to B. Each of these conveyances was recorded before the execution of the one next subsequent. Afterwards E., knowing of the mortgage to B., released the portion conveyed to L. from his mortgage. *Held*, on a bill of

foreclosure brought by E. against G. and B., that the latter was not entitled to a deduction from E's mortgage proportionate to the value of the estate released in comparison with that of the land originally included in the mortgage. *Lyman, Adm'r. v. Lyman et al.*, 79.

2. When lands subject to a common burden are sold in parcels at different times, and the deeds are recorded in the order of their execution, the purchasers of the different portions must, as among themselves, contribute to the common burden in the inverse order of the conveyances. *Id.*

3. In marshaling assets in equity, it is indispensable that all the parties in interest should be before the court; or at least that the assets should be so before this court that the judgment would operate *in rem*. Such is not the case with money deposited in a bank in this State by a citizen of another State, not a party to the bill. *Shedd & Co. v. Bank of Brattleboro*, 709.

4. In a case free from fraud there is no such privity among attaching creditors of the same debtor, when one has the first attachment of two distinct and differently located parcels of property, each being sufficient to secure his debt and the other has an attachment upon only one of such parcels, as will justify a court of equity to so marshal the assets as to compel the first attaching creditor to collect his debt solely out of the property which the other has not attached. *Id.*

MASTER AND SERVANT; See RAILROADS 4, 5.

MISCARRIAGE; See ABORTION.

MISTAKE; See CONTRACT 1; CONSTRUCTION.

MORTGAGE.

1. In a petition for the foreclosure of a mortgage it was alleged that the mortgagee was dead; that the petitioner was one of his heirs; that the mortgagee's heirs divided his property among themselves, and agreed that the note and mortgage in question should belong to the petitioner; and that they were then assigned and delivered to her; *Held*, that this was a sufficient averment that the legal interest in the mortgage and note in question had been transferred to the petitioner. *Babbitt and Wife v. Bowen et al.*, 437.

2. In such a case it further appeared that there was only one unpaid claim against the mortgagee's estate, and that amounted to only one hundred dollars; that no administrator had been appointed, nor any proceedings had in the probate court relating to the settlement of the estate; that the estate amounted to about forty thousand dollars; that all the heirs of the mortgagee admitted the mortgage debt in question to belong to the petitioner; and that the only person claiming to be a creditor of the estate, though aware of the petition for foreclosure, had not asked for the appointment of an administrator, nor claimed the benefit of this mortgage debt as a security for her claim, nor asked to be made a party to the petition. *Held*, that the petitioner was entitled to a decree of foreclosure, upon furnishing the maker of the mortgage note indemnity against any liability to pay it a second time. *Id.*

See MARSHALING 1, 2; USURY 3.

MOTION IN ARREST OF JUDGMENT.

1. If a declaration in an action for the breach of a warranty in a sale allege both general and special damages, but do not allege the latter sufficiently to authorize their recovery, it will not be presumed after verdict, on a motion in arrest, that the jury included such special damages in their verdict. *Packard v. Slack*, 9.

See SLANDER, 9, 10.

MURDER.

1. In trials for murder it is the duty of the courts, first, to regard the accused as innocent until he is proved guilty; and, secondly, after he is shown to have committed a homicide, to look for every excuse, which may reduce the guilt to the lowest point, consistent with the facts proved. *REDFIELD*, Ch. J. *State v. McDonnell*, 491.

2. If in a mutual combat arising without previous malice, mutual blows be given before the respondent draws his knife, and he then draws it in the heat and fury of the fight and deals a mortal wound, with the purpose of taking life, the offence is only manslaughter. *Id.*

3. But if the design to kill be formed deliberately for ever so short a time before the infliction of the mortal wound, or if it be formed without such provocation as the law regards as sufficient justification for heat of blood and anger, the offense is murder. *Id.*

4. If one inflict a mortal wound, with a deadly weapon, upon a vital part, it is a presumption of fact that he designed the natural consequences of his act; and it is murder, unless he shows that the result was not designed, or that the act was done in heat of blood upon legal provocation, or under justifying circumstances. *Id.*

5. The charge of the court to the jury in this case held erroneous, (and a new trial granted therefor,) because, there being testimony tending to prove a case of manslaughter only, the court neglected to call the jury's attention to it in that light, or to the theory of the respondent's counsel upon the evidence, indicating that it was manslaughter and not murder, and omitted to inform the jury of the distinction between murder and manslaughter, except in a few abstract remarks, unaccompanied by any application of them to the facts in the case. *Id.*

NEGLIGENCE.

1. The question of negligence is not always a matter of law where there is no conflict in the testimony as to the particular facts. If it still rests upon discretion, experience and judgment to determine whether the acts complained of constituted a departure from the course which men of ordinary care and prudence would have pursued under the same circumstances, it is matter of fact for the jury. *Vinton v. Schwab*, 612.

2. One may act in good faith and still be guilty of gross negligence. *Lincoln v. Buckmaster*, 652.

See PROMISSORY NOTES 2, 3, 4.

NEW TRIAL.

1. The fact that an officer in serving a justice writ, with an *ad damnum* not exceeding ten dollars, delivers to the defendant a copy of the writ with the *ad damnum* stated at more than that sum does not render the suit appealable; nor does the fact that in such a case the defendant appeared, and a judgment was rendered against him under the supposition on his part that he could appeal therefrom, make a case within the power of the county court to set aside the justice's judgment. *Downs et al. v. Read*, 785.

2. The exercise of the power of the county court to set aside the judgment of a justice of the peace in cases within the purview of sec. 8, chap. XXXVI, Comp. Stat., is entirely within the discretion of the court. No error, therefore, can be predicated upon the court's refusal to set aside such a judgment, unless it appear that such refusal was put upon some other ground than the exercise of the discretion of the court upon the facts presented. *Ib.*

NOTICE.

See CHANCERY 1, 2, 3; HIGHWAY 3; PRINCIPAL AND AGENT 2.

OFFICE.

See ILLEGAL CONTRACT 4, 5, 6, 7.

OFFICER.

1. An officer serving a citation on one to be present at the taking of the deposition of another, should make return of his doings to the authority issuing the citation. *Parker v. Meader*, 300.

2. Therefore, *held*, that a citation, signed by a justice of the peace in Orange county, and addressed generally to any sheriff or constable in the State, notifying the defendant in a suit pending in Caledonia county to appear out of the State at the taking of a deposition of another party to be used in such suit, might properly be served on the defendant in Caledonia county by a deputy sheriff of Orange county. *Ib.*

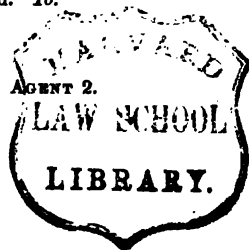
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PARENT AND CHILD.

1. An agreement between father and son, by which the former agrees to relinquish his right to the services of the latter during his minority for a certain sum per annum, reserving a claim upon his wages to that amount, and



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the right to treat the agreement as void in case that sum is not paid, and also to have the care of his son and the control of his affairs during his minority, so far as to see that he gets his pay from those for whom he works, and that his wages are kept and used for his benefit, is not such an agreement of emancipation as divests the father of his right to sue for and collect pay for his son's services. *Mason v. Hutchins & Co.*, 780.

2. A publication by a parent of a notice of the emancipation of his son, more liberal to the latter than the actual agreement between them, will not, as against one who has no knowledge of such publication, estop the father from insisting on such right to his son's wages as the contract between them actually gives. *Id.*

3. Neither will the false statement, made under such circumstances, by the son to his employer, that he has been emancipated by his father, cut off the father's right to his wages, if the employer does not do or neglect to do something on the faith of such statement. *Id.*

PARTNERSHIP.

1. In book account against P. and B., it appeared that the services and articles charged were rendered and furnished by direction of P. alone, but the plaintiff claimed that the defendants were co-partners, and jointly liable therefor. The auditor found that the defendants were not co-partners when the plaintiff's account accrued, but that they had been in partnership until a short time previous, that their co-partnership was notorious in their neighborhood, that no notice of its dissolution had been given by publication or otherwise, that P. continued the same business at the same place after the dissolution and that the plaintiff rendered the services and furnished the articles charged in connection with such business. The county court rendered judgment upon the auditor's report against both defendants. *Held*, that the facts found by the auditor were not sufficient to warrant the county court in rendering judgment against the defendants as co-partners, but that to establish such liability it must also appear: 1st, that the plaintiff, at the time the contract was made under which his account accrued, knew that the defendants had been in partnership: 2d, that he was ignorant of their dissolution: and 3d, that he made the contract supposing he was contracting with the defendants as partners, and in reliance upon their joint liability. *Pratt v. Page et al.*, 13.

2. *Held*, also, that the supreme court would not presume that the county court inferred from the facts reported by the auditor, such other facts as were necessary to sustain their judgment. *Id.*

3. A. and B. were two accredited agents of the New England Protective Union, A. for the making of purchases, and B. for the selling of produce. By the rules of the association, all purchases were required to be for cash, and not on credit; and this rule was known to both plaintiffs and defendants. A. purchased from the plaintiffs goods to the value of nine thousand dollars, on credit, but without the knowledge of B. *Held*, that no partnership existed between A. and B. by which the latter could be compelled to pay the debts incurred by the former, for the purchase of goods on credit, without B's

knowledge, in violation of the express terms of the partnership, known to the plaintiffs, and in the absence of any fraud or deception practised upon them. *Chapman et al. v. Devereux et al.*, 616.

4. When no credit is given, and no expectation, originally, of looking to one partner for debts incurred by the other, no recovery against the former can be had. *Id.*

5. Where C., the plaintiff, trusted A., one of the defendants, who were partners in violation of the rule of the partnership, which C. ought to have or might have known by inquiry, and in the absence of any deception, he cannot look to B., the other partner, for payment of his debt, because such debt was contracted without the scope of the partnership, and upon the individual liability of A. *Id.*

6. Partnership defined to be a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses. *Id.*

7. The defendant's evidence tended to show that B. and W. were not members of an association. Evidence tending to show that they were members was introduced by the plaintiffs. *Held*, that it was properly submitted to the jury, as a matter of fact, to determine whether or not they were members, and that in determining the question, their intent and understanding in relation thereto, at the time they were alleged to have become members, as gathered from the evidence, was a material consideration for the jury. *Smith et al. v. Hollister*, 695.

See CHANCERY 7; CONFESSION OF JUDGMENT 1, 2; PROMISSORY NOTES 1, 3.

PAUPER.

1. In order to sustain a proceeding for the removal of a pauper, he must have gone to the town, asking for the removal, with the intention of remaining there, or have formed that intention after arriving there. If such be not the case, the remedy is an action of assumpsit for the support of the pauper, as a transient person, under sec. 16, chap. XVIII, p. 133, Comp. Stat. *Brownington v. Charleston*, 411.

NOTE.—A person *non compos* cannot be said to go to a town to reside, so that an application for his removal can be sustained. He is to be regarded merely as a transient person in any other town than that in which he has his legal settlement. *Ryegate v. Wardboro*, Caledonia County supreme court, 1857, not reported.

2. The town of C. being chargeable for the support of a pauper, upon the removal of the person, with whom the pauper resided, from C. to the town of B., contracted with such person to support the pauper in B. for a certain time, and under this agreement the pauper removed from C. to B. with such person. *Held*, that neither such a removal under the circumstances, nor the fact that the pauper had remained in B. for about ten months after the time for which the town of C. agreed to support him there, constituted such a going to B. to reside, as would sustain an application by that town for an order of removal,

it appearing that the pauper remained there through inability, on account of poverty, to leave; but that the proper remedy was an action of assumpsit by B. against C. for the expenses of the pauper's support as a transient person. *Ib.*

3. A declaration in assumpsit counting upon the neglect of a town to provide for the support of a transient poor person, brought by the person supporting him against the town in which he is found, in accordance with section 16, chap. XVIII, p. 133, Comp. Stat., is not supported by proof that the town, on being requested to provide for such transient person's support, expressly promised to do so, but afterwards failed to perform such promise. *Howe v. Royalton*, 415.

4. The declaration in this case held to count upon the statute liability of the town for neglect to provide for a transient person's support, and not upon the breach of an express promise to do so. *Ib.*

PLEADING.

1. The third section of the act of 1856, which provides that "the party against whom matter is specially pleaded in confession and avoidance in answer to matter by him antecedently alleged, may by a general form of denial traverse and put in issue all the material facts so pleaded by the other party," is sufficiently complied with in an action of assumpsit by a denial of all the allegations of the plea in the same words in which they were pleaded. *Austin v. Chittenden*, 168.

2. Such a denial only puts in issue the material facts pleaded by the other party, the same as when the general issue is pleaded to a declaration. *Ib.*

3. The plea of *son assault demesne* is a sufficient answer to a declaration in trespass for assault and battery, though the declaration contain averments of personal injuries to the plaintiff, showing the assault to have been of a very aggravated character. *Mellen v. Thompsons*, 407.

4. The question whether the defendant used an excess of force in his own defence, is in general to be determined only upon the evidence; and this issue is raised by the replication of *de injuria*. *Ib.*

5. In trespass for a simple assault and battery, a plea is sufficient which alleges that the defendant *molliter manus imposuit*, etc., in his reasonable efforts to prevent the plaintiff from breaking the peace by an assault upon a third person; but *aliter*, when the declaration alleges extraordinary or aggravated force on the part of the defendant. *Ib.*

6. An omission of the formal concluding words of a pleading cannot be taken advantage of by a motion in arrest of judgment; it can only be objected to by special demurrer. *Stearns v. Adm'r of Stearns*, 678.

7. Where a fact alleged in the plea may be true and yet be no bar to the action, a denial of that fact in the words of the plea (omitting to answer other

material allegations,) forms an immaterial issue; but when the fact pleaded is a good defence to the action, and that fact is traversed in the words of the plea, the traverse is sufficient. *Id.*

See ASSUMPSIT 3; CONSTABLE 1, 2; CONTRACT 2; HIGHWAY 3; MOTION IN ARREST; PAUPER 3, 4; PRACTICE 2; SLANDER 2, 6, 7, 8, 9, 11.

PRACTICE.

1. A party who has set a cause down "not for the jury," and has failed to show to the court a good cause of continuance, is not entitled to have the damages assessed by the jury. *Briggs v. Gleason*, 472.

2. When the declaration contains several counts, setting out the cause of action in different ways, to meet any differences that may arise on the proofs, or different views that may be taken of the legal effect of the language of a contract, it is the duty of the county court, when any question is there made upon the matter, to direct the attention of the jury and confine the recovery to such counts as the proof sustains; but when no question is raised thereon, and the court is not called upon to distinguish between the different counts and the special applicability of the evidence to each, and no objection is made to the admissibility of evidence upon particular counts, no exception can be taken, because the court does not voluntarily assume such duty. *Brintnall v. S. & W. R. R. Co.*, 665.

See APPEAL 2; ATTACHMENT 3, 4; BASTARDY; EVIDENCE 10; EXECUTION 2; JURY 1, 2; RAILROADS 9; SUPREME COURT 3, 4; TRUSTEE PROCESS 6, 7.

PRESUMPTION.

1. The validity of a tax sale will not be presumed from the mere deed of the collector unaccompanied with extrinsic evidence that any of the prior proceedings, requisite in case of a vendue sale, were taken, or if any were taken, that they were carried on in a legal manner in any particular. *Townsend v. Admr. of Downer*, 183.

2. Neither, in an action of ejectment, will any presumption be made in favor of the validity of such a deed, merely because the party claiming under it proves an adverse possession to the title of the other party, if such adverse possession be for a less period than that prescribed by the statute of limitations as a bar to the other party's claim. *Id.*

3. The defendant in ejectment may, for the purpose of defeating the plaintiff's recovery show even by *presumptive* evidence an outstanding title in another, though the defendant be in no way connected with such title. *Id.*

4. In such actions, circumstances, though in themselves slight and trivial, yet if accompanied by long and peaceable possession, should be allowed to go to the jury as evidence for the defendant to prove the presumed existence and loss of deeds or other instruments. *Id.*

5. The circumstances detailed, which in this case were held proper to go to the jury in connection with the fact of long and peaceable possession, as evidence tending to raise the presumption of a grant. *Id.*

6. The presumption of a grant from such circumstances is one of fact and not of law. *Id.*

7. In cases not within the statute of limitations grants are presumed, or proved by mere length of possession and without auxiliary circumstances. *Id.*

8. But in cases within the statute of limitations mere length of possession, however great, will not be sufficient to raise the presumption of a grant, unless the possession is for as long a period as that required by the statute to constitute a bar to a counter claim. But in such cases, where there has been a long and peaceable possession of land consistent with the grant to be presumed, and there are other circumstances which make it reasonable to believe that such grant was actually made, but through great lapse of time, or other causes, the proper evidence of such grant is probably lost or destroyed, then the length of possession and the auxiliary circumstances should be allowed to go to the jury, and they should pass upon the question whether a grant has probably been made. *Id.*

9. If a deed conveying an entire tract, or several different parcels of land, is sought to be proved by presumptive evidence, possession by the grantee of a part of the tract, or of some of the parcels, claiming under the deed, is evidence to prove its existence in a suit, in which the title to a portion of the tract, or to a separate parcel, comes in question, although there has been no actual possession of the portion or separate parcel sued for. *Id.*

10. Though the ancient record of a deed improperly acknowledged is not in itself evidence of the execution of the deed, yet such record, in connection with long and undisputed possession consistent with the deed, and other circumstances which tend, as matter of fact, to show the probable execution and loss of such a deed, is admissible as evidence to go to the jury upon the question whether they will presume the existence and loss of the deed. *Id.*

See SUPREME COURT 1, 2.

PRINCIPAL AND AGENT.

1. Where there is an actual want of authority from the principal for the acts of his special agent, the former will not be liable therefor; but *aliter*, where there is an authority for such acts, notwithstanding the agent has violated his private instructions as to the mode of its execution. *Hurlbut v. Kneeland*, 316.

2. If a director of a bank act in behalf of the bank in a transaction of which the bank takes the benefit, notice at the time, to the director, of any fact material to such transaction, is notice to the bank. *Smith et al. v. South Royalton Bank et al.*, 341.

See ILLEGAL CONTRACT 3; RAILROADS 11.

PRINCIPAL AND SURETY.

When the liability of a surety upon a promissory note has been once discharged, by an arrangement between the principal promisor and the payee, by

which the note is paid; no subsequent retraction or waiver of the payment by the principal promisor with the consent of the payee or his representatives, to which the surety was not a party or privy, though it should restore the obligation of the note so far as the principal is concerned, can revive the liability of the surety upon it. *Gibson, Admr v. Rix*, 834.

See USURY 1, 2.

PROBATE COURT.

1. The probate court has no authority, for the purpose of enforcing a final decree for the mere payment of money, to imprison the party against whom such decree has been made, and an administrator so imprisoned is entitled to be discharged on *habeas corpus*. *In re Bingham*, 329.

2. It seems, however, that the probate court may enforce by imprisonment its interlocutory decrees in proceedings pending before it, which are necessary to bring such proceedings to a final decree; and also may in that way enforce against its appointees such final *specific* decrees as require the delivery by them to others of specific articles of property, or even specific money, held by them merely as depositaries. *Ib.*

3. But a decree against an administrator, who has been discharged and has settled his account, to pay over to his successor the balance of money found due from him to the intestate, such money having been received by him for the sale of the personal and the use of the real estate of the intestate, is not such a specific decree as can be enforced by the probate court by imprisonment. *Ib.*

See APPEAL 3, 4, 5, 6, 7; BOND; EXECUTORS AND ADMINISTRATORS 1, 2, 3; HUSBAND AND WIFE 1; TRUSTEE PROCESS 9, 10; WILL 4, 5.

PROMISSORY NOTES.

1. If the several members of a partnership have power to bind the firm by the execution of promissory notes in the firm name in matters pertaining to the partnership business, the firm will be liable to the *bona fide* purchaser of a note in their name, though executed by one partner, even though it be without consideration, or upon a consideration not inuring to the partnership use. *Roth & Co. v. Colvin, Allen & Co.*, 125.

2. The questions, whether the holder of current negotiable paper has taken it with or without notice of defences between prior parties, whether he has exercised good faith in the transaction, or has been guilty of negligence or a want of proper care, are always questions of fact to be determined by a jury. *Ib.*

3. The defendant, residing at Burlington, was a member of a firm of wharfingers, the other members of which resided and did the firm business at Port Kent, N. Y., the defendant having no active participation in the management of the business. One of the firm without the defendants' knowledge, executed in the partnership name three notes, one for five hundred dollars, and two for one thousand dollars each, without consideration, all dated in the same month,

and payable to C., or order, who, before their maturity, negotiated them for a valuable consideration to the plaintiff, to whom he was largely indebted, and who knew that he was insolvent and that the defendant did not reside at the place of the business of the firm, where the notes were dated. The plaintiffs had no knowledge of any custom or necessity of the defendants' firm to execute notes, and took the notes in question relying on the responsibility of the defendant, and supposing them to be business notes, but they made no inquiry as to his knowledge of their execution, or whether they were in fact business or accommodation paper. The plaintiffs having sued the defendant on the notes, the case was referred, and the referee, after reporting the foregoing facts, stated that he was of opinion from said facts that the plaintiffs ought, in good faith towards the defendant, to have inquired before they took the notes from C., whether the defendant had authorized the making of them, and that they were wanting in due diligence in not inquiring of the defendant, or C., whether they were accommodation notes or not. *Held*, that this statement of this opinion of the referee was to be considered as the decision by him of questions of fact, and as such was conclusive; that the facts recited by him had a legal tendency to support such a decision; and that the plaintiffs were not entitled to recover. *Ib.*

4. The purchaser of negotiable paper must exercise reasonable prudence and caution in taking it; and if the circumstances are such as would excite the suspicion of a prudent and careful man in regard to the binding force of the paper as between the original parties, and the purchaser take it without making inquiry, he will not stand in the position of a *bona fide* holder, and cannot recover upon it, though he may have paid value for it. *Ib.*

5. The law of the place of payment of a promissory note determines whether days of grace are allowed upon it or not. Where no particular place of payment is fixed by the note itself, the place of execution is the place of payment, without regard to the residence of the parties, or the place at which the note is dated. *Blodgett v. Durgin*, 361.

6. But *quere*, whether if the holder of a note, payable generally, is not aware that it was executed at a different place from that at which it is dated, he will not be protected, if he charges the indorser by presentment and notice according to the law of the latter place, even though he may not have done so according to the law of the place where the note was in fact executed. *Ib.*

7. If the holder of the note does not know the residence of an indorser and cannot ascertain it by diligent inquiry, it is sufficient to charge him, if the holder give him notice of its presentment and non-payment at the first opportunity. *Ib.*

8. If an indorser of a note with a full knowledge of the existence of facts, which in law would discharge him from liability thereon, promise to pay the note, he will be bound thereby. *Ib.*

9. The facts that three months had elapsed between the maturity of the note and such a promise by the indorser, that the latter had an agent at his residence who attended to his correspondence, and that he had himself received no notice of non-payment, were held sufficient evidence to authorize the court

to submit to the jury to find thereon whether or not, the indorser, at the time of making such promise, was aware that the holder had not taken the proper legal steps to charge him as indorser. *Id.*

10. A note given by one in falling circumstances, made payable on demand, and executed solely for the purpose of being immediately put in suit in order to secure the maker's existing obligations to the payee, which have not yet matured, is valid even against subsequent attaching creditors of the property attached in the suit on such note, and whose claims had matured at the time of its execution. *Shedd & Co. v. Bank of Brattleboro*, 709.

See ILLEGAL CONTRACT 7, 8, 9, 10, 11; PRINCIPAL AND SURETY; RESCISSION OF CONTRACT 4; TRUSTEE PROCESS 1.

PROTEST; See COMMON CARRIER 1.

QUO WARRANTO.

1. An act of the Legislature incorporating the village of Bradford provided that a meeting of the legal voters of such village should be held, and that if a majority of the legal voters present should vote in favor of accepting the charter, it should be in force, but otherwise void. The meeting was held, and the majority of the votes cast were in favor of accepting the charter, and officers were elected as provided thereby, and the village was organized as a corporation. Upon a motion by the State's Attorney for leave to file an information in the nature of a *quo warranto* against such corporation and its officers, setting forth that a portion of the vote at such meeting was fraudulent, and that in fact a majority of the legal voters present voted against the acceptance of the charter, and upon testimony showing the truth of the allegations in the information, the supreme court allowed the information to be filed, and ordered that the corporation be dissolved, and that the other defendants should no longer exercise any of the functions pertaining to the offices thereof. *State v. Bradford et al.*, 50.

2. But the officers of the corporation having filed a disclaimer of any purpose of exercising the functions of the offices to which they had been elected, no costs were allowed against them, on the ground that there was no distinct evidence of their participation in any illegal or improper proceedings in effecting the organization under the charter. *Id.*

RAILROAD BOND; ASSUMPSIT 3; TROVER 5, 6.

RAILROADS.

1. One, whose land has been taken, appraised and paid for by a railroad company, under their charter, for railroad purposes, has no right to enter upon or use such land for any purpose which in the least degree endangers or embarrasses its use, by the company, for any of the objects which the railway is intended to accomplish; as in this case, for instance, to enter upon the land with teams to remove turf therefrom, the effect of such entry and removal being to enhance the danger of cattle getting upon the track, and to increase the dust at the time of the passage of the cars. *Conn. & Pass. R. R. Co. v. Holton*, 43.

2 Under sec. 43, chap. 26, p. 200, Comp. Stat., in regard to railway farm

crossings, neither the railway company nor the adjacent land owner have the right to determine separately, and without the consent of the other party, the number, character and location of the farm crossings. *Ib.*

3. The Western Vermont Railroad Company, before their road was laid out or surveyed, procured a bond from B. to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary, and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road and requisite accommodations. The survey of the road, made by order of the directors, designated certain land belonging to B., as depot grounds, and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff, having recovered a judgment against the company, levied his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land embraced in the levy was never necessary to the company for railroad purposes, and would not become so prospectively. *Held*, that by B.'s contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations; that under their charter the company could not acquire any more land, or any greater estate therein, for the purposes of a road bed or stations than was really requisite for such uses; that the estate so requisite was not one in fee simple, but merely an easement, and was therefore not subject to be levied upon by the creditors of the company; that when taken for such purposes the rule was the same whether the land was taken compulsorily by condemnation and the award of commissioners, as to its extent and price, or under the agreement of the parties as to one or both of these particulars; that under their charter the directors had power to lay out their road and stations as they saw fit, and that so long as they acted in good faith, and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive. *Hill v. Western Vt. R. R. Co.*, 68.

4. The plaintiff's intestate, who was an engine driver on the defendants' railroad, was killed by the explosion of the locomotive which he was running, which explosion occurred in consequence of the neglect of the defendants' master mechanic to keep the locomotive in repair. The duty of this master mechanic was to superintend and direct the repairs of all the locomotives on the defendants' road. The directors of the defendants were not guilty of any neglect in furnishing their road in the first instance with suitable machinery and faithful and competent employees, and they were ignorant of any defect in the locomotive in question. In an action brought by the plaintiff, as administrator of the engine driver, for the benefit of his widow and next of kin, to recover damages for his death, *held*, that the defendants were not liable. *Hard, Admr v. Vt. & Canada R. R. Co.*, 473.

5. Though it is the duty of a railroad company to exercise all reasonable care in procuring for its operation sound machinery and faithful and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for injuries occasioned by the neglect of any of his

co-servants, employed in the same general business of operating the road, even though the negligent servant in his grade of employment is superior to the one injured. *Ib.*

6. A subscription for the stock of a railroad company provided that the money so subscribed should be expended in the construction of the road from St. Johnsbury to Derby Line, and also that it should not be binding until the whole road from St. Johnsbury to Derby Line should be put under contract for grading. *Held*, that this was not merely a general description of the road, requiring the whole of it to be put under contract before the subscription was payable, but that it created an express condition to the validity of the subscription, that the road should be put under contract as far north as Derby Line. *Conn. & Pass. R. R. Co. v. Baxter*, 805.

7. *Held*, also, that the term, *Derby Line*, in the absence of any evidence as to its meaning, except the subscription itself, and the fact that the charter fixed the northern terminus of the road in the north line of Derby, must be construed to mean the north line of Derby. *Ib.*

8. But, the defendant having shown that the words *Derby Line*, in common usage, meant a village of that name in Derby, it was *held*, that it became a question of fact for the jury to decide, whether that expression in this contract, meant the north line of Derby, or the village named *Derby Line*. *Ib.*

9. In an action to recover the amount of the defendant's subscription for a portion of the plaintiff's capital stock, the plaintiff offered to prove that at a public meeting of the friends of the road, held in the neighborhood of the village of Derby Line, prior to the defendant's subscription, a form for the conditions of subscription was under discussion, in which the words "*Derby Line Village*," were used to signify the northern terminus, and that the word *Village* was stricken out therefrom, at the request of some one who argued and believed that the expression *Derby Line* would leave open the question of terminus to be subsequently fixed at any point in the north line of Derby; but the plaintiff did not offer to prove, and did not prove, that the defendant was present at, or ever aware of such meeting. *Held*, that the testimony was inadmissible, and that it was error to admit it, notwithstanding the court in their charge to the jury, instructed them that it was immaterial. *Ib.*

10. *Held*, also, that evidence was inadmissible to prove that the route adopted, which terminated in the north line of Derby, and not at Derby Line Village, was more feasible, and better for the company and the public, than any route leading to that village. *Ib.*

11. *Held*, also, that if the plaintiff's agent, who obtained the defendant's subscription, represented that the route, intended by the written condition, was one terminating at Derby Line Village, and the defendant subscribed in reliance upon such representation, the plaintiff was bound thereby, whether it was made fraudulently, or not. *Ib.*

12. The proviso to sec. 14, of the charter of the Conn. and Pass. R. R. Co., gave the land owner no right to cross the track which could not be controlled and regulated by subsequent general legislation, and sec. 43 of chap. 26 of the Compiled Statutes had the effect to regulate and define the right of crossing conferred by that proviso. *Conn. & Pass. R. R. Co. v. Holton*, 42.

13. The owner of land adjoining a railroad track has no right to build a farm crossing at any other point than the one fixed by the commissioners, or agreed upon with the railroad company, nor to cross the track at any other point than the established crossing. *Ib.*

14. A railway company may maintain trespass for all unlawful entries and acts upon the land taken by them for railroad purposes under their charter, whenever such entries and acts interfere with the exclusive possession of such land which the company is entitled to. *Ib.*

See COMMON CARRIER 3.

REASONABLE INQUIRY, See CHANCERY 1, 2.

RECEIPT, See ATTACHMENT 8; EVIDENCE 3.

RECEIPTOR, See ATTACHMENT 2.

RECORD, See EVIDENCE 13.

RECOVERY OF MONEY PAID UNDER PROTEST, See COMMON CARRIER, 1.

REFEREE, See PROMISSORY NOTES 3.

REFERENCE.

1. An enlargement of a rule of reference, issued by a justice of the peace in conformity with the 63d sec., chap. XXIX., Comp. Stat., p. 287, cannot be made by the referee, but only by the justice himself with the consent of the parties; and unless the report of the referee is made pursuant to the rule of reference, as originally issued, or regularly enlarged, no judgment can be rendered on it. *Lazell v. Houghton*, 579.

2. The mere statement in the referee's report of the enlargement of such a rule of reference, is not sufficient evidence that it was regularly enlarged. A record or certificate from the justice to that effect is requisite. *Ib.*

3. If a cause be referred before any plea in offset has been filed, and the rule of reference does not provide for the adjustment of claims in offset, the referee has no authority to consider any such claims. *Fulton v. Wiley*, 762.

REPLEVIN.

The owner of property, attached in a suit against another, may maintain replevin therefor against the attaching creditor and the officer jointly, when the former assisted in taking the property, and took it into his own possession after the attachment. *Esty v. Love et al.*, 744.

RESCISION OF CONTRACTS.

1. Where one has the right to rescind a contract and exercises that right, he must generally restore the other party to the same condition he would have been in if no contract had been made. *Downer v. Smith*, 1.

2. But when one rescinds a contract on the ground of fraud, he is only bound to do so with all reasonable dispatch after he discovers the fraud, and he does not lose his right to rescind, because at that time the contract has been in part executed, and the parties cannot for that reason be fully restored to their former position. *Ib.*

3. But if, after discovering the fraud, he continues to act under the contract, his right of rescision is thereby waived. *Ib.*

4. When notes are given for the purchase of property, which the purchaser has the right to rescind on account of fraud, but neglects to do so, and continues to act under the contract after he discovers the fraud, he will not be permitted to defend an action upon the notes on the ground of the fraud. *Ib.*

5. A contract of sale cannot be rescinded after delivery simply because the article delivered is not equal in quality to that contracted for. The difference must be one of *kind* or *class*. *Hoadley v. House*, 179.

6. In order to rescind a contract of sale on account of a difference in *kind* between the article contracted for and that delivered, notice must be given to the other party thereof as soon as the difference is discovered, and so far as possible, the party seeking to rescind must restore the other party to the condition he was in before the contract was made. *Ib.*

7. Therefore, where one had sold and disposed of a portion of certain goods, which another party had delivered him upon a contract of sale, before he discovered that the goods delivered were different in kind from those contracted for; and thereupon immediately notified the other party to take the remaining goods back for that reason, and said he would pay him for the portion he had sold; *Held*, that the rescision of the contract was not complete, because the vendee did not *tender* the vendor the value in money of the goods which he had sold. *Ib.*

REVOCATION; *See* WILL 2, 3.

SALE; *See* ATTACHMENT 5, 6, 7; BOOK ACCOUNT 2; CONFLICT OF LAWS 1, 2; CONTRACT 1, 3, 4; DAMAGES 2, 3; FRAUDULENT CONVEYANCE 1, 2, 3; RESCISSION OF CONTRACT 1, 2, 3, 4, 5, 6, 7.

SCHOOL DISTRICTS.

1. A person resident in a school district on the 1st of April, and properly listed there, remains subject to taxation therein upon such list while it remain in force notwithstanding he has subsequently removed from the district *Walker v. Miner*, 769.

2. The officers of a school district hold^g their office until their successors are legally chosen. *Ib.*

3. The neglect to comply with the provision of the statute requiring the warrant for the collection of a school tax, to specify a limited time within which the tax is to be collected, is not a defect of which a person taxed can take advantage; and though it may render the warrant informal and defective as between the district and the collector, it does not invalidate the action taken by the latter to collect the tax. *Ib.*

SCHOOLMASTER.

1. Though a schoolmaster has in general no right to punish a pupil for misconduct committed after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and to subvert the master's authority.—*Lander v. Seaver*, 114.

2. A schoolmaster is not relieved from liability in damages for the punishment of a scholar which is *clearly* excessive and unnecessary, by the fact that he acted in good faith and without malice, honestly thinking that the punishment was necessary both for the discipline of the school and the welfare of the scholar. *Ib.*

3. But if there is any reasonable doubt that the punishment was excessive, the master should have the benefit of it. *Ib.*

4. Upon the question whether the punishment of a pupil by his master was excessive or not, evidence that the ordinary management of the latter as a teacher was mild and moderate is not admissible. *Ib.*

5. It *seems*, however, that such evidence would be admissible in regard to the question whether the punishment was wanton and malicious. *Ib.*

6. Whether a rawhide is a proper instrument of punishment of a pupil by his master is for the jury to decide, in consideration of all the circumstances of the case. *Ib.*

7. Upon the question whether a school teacher acted maliciously in the punishment of a scholar, it is competent for the former to show that in other schools in the vicinity the same instrument of punishment is used as that resorted to by him. *Ib.*

8. In trespass against a schoolmaster for the punishment of a scholar on account of misconduct out of school, it was held that it was competent evidence against the charge that the punishment was excessive, to show that at a former trial of the same case, no claim of that kind was made, but that the plaintiff then only claimed that the master had no right to punish for such misconduct. *Ib.*

SCHOOLS, *See* DISTRICT SCHOOLS 1, 2; SCHOOLMASTER.

SERVANT, *See* MASTER AND SERVANT.

SERVICE, *See* DEPOSITION 1, 2.

SERVITUDES.

1. S. originally owned a mill, and an artificial, but ancient, mill-pond, with the surrounding land. He subsequently granted a parcel of such surrounding land, not however bounded on the pond, to the plaintiff's grantor by warranty deed, with no expressed reservation therein of any right to flow the same, and afterwards conveyed his mill and water privilege to the defendants'

grantors. *Held*, that by his deed to the plaintiff's grantor, S. did not part with the right to flow such land, as he had formerly done; and that the subsequent exercise of such right by himself, and his grantees of the mill, was not a breach of his covenant against incumbrances; and, independently of the plaintiff's rights derived from adverse use, was not the ground of an action in his favor. *Harwood v. Benton & Jones*, 724.

2. If one, by raising the height of water upon his own land, cause subterranean streams to set back and stand upon the land of another, the latter has no ground of action therefor. *Id.*

SETTLEMENT OF ESTATES.

It is not indispensable to the settlement of a deceased person's estate that an administrator should be appointed, or that the probate court should take any proceedings relative to the estate. The heirs may, if they see fit, pay the debts and divide the surplus among themselves. *Babbitt and wife v. Bowen et al.*, 437.

See EXECUTORS AND ADMINISTRATORS 1, 2, 3; HUSBAND AND WIFE 1; LIMITATIONS (STATUTE OF) 1, 2; TRUSTEE PROCESS 9, 10.

SLANDER.

1. Words charging an unmarried woman with unchaste conduct are not actionable *per se*, unless the charge is one of sexual intercourse with a married man, or of such conduct as amounts to open and gross lewdness. *Underhill v. Welton*, 40.

2. Words, charging an unmarried woman with being a whore, are actionable if any pecuniary damage is alleged and proved to have resulted therefrom. In this case, it was held sufficient to allege and prove that in consequence of grief occasioned by the speaking of such words, the plaintiff either suffered loss of time, or was prevented from pursuing her usual avocations with the strength and health she otherwise would have enjoyed. *Id.*

3. In an action for slander, if the declaration allege that the defendant charged the plaintiff with a crime, and the proof disclose merely that he said he supposed the plaintiff to be guilty of such crime, the variance is fatal. *Dickey v. Andros*, 55.

4. But the latter expression would be actionable. *REDFIELD*, Ch. J. *Id.*

5. But it is not actionable to express a supposition or belief that one went to a place for the purpose of persuading another to commit adultery with him. *Id.*

6. Though it is not proper to join in the same counts as ground of recovery a slander and a libel, yet when the written accusation is matter of inducement and preliminary to the verbal one, it may be set forth as such in the declaration. *Hoyt v. Smith*, 304.

7. In an action for slander it is proper to include in a single count words spoken at different times, and to different persons, in relation to the same subject. *Id.*

8. In an action for slander the innuendoes "meaning to insinuate and falsely represent," "meaning to insinuate and be understood," or "meaning and intending to represent," that the plaintiff had stolen the money aforesaid," indicate that the defendant's charge against the plaintiff was that he had stolen the money, and are therefore sufficient. *Ib.*

9. Upon a motion in arrest of judgment in an action of slander the allegations in the declaration are to be examined in connection with the whole record, and if, though imperfect in themselves, the imperfection is supplied by an admission in the plea, the motion in arrest will be overruled. *Ib.*

10. The declaration in slander in this case considered, and adjudged sufficient on a motion in arrest after verdict for the plaintiff. *Ib.*

11. Averments were introduced into the declaration of words spoken by the defendant imputing dishonesty to L., the name of L. being followed by the innuendo, "meaning the plaintiffs' agent and clerk;" but there was nothing else in the declaration showing any connection between L. and the plaintiffs. Held, that in the absence of a direct averment connecting L. with the plaintiffs, or their business, the words alleged to have been spoken concerning him were not actionable in favor of the plaintiffs. *Smith et al. v. Hollister*, 605.

12. To maintain an action for slander, the substance of the alleged charge must be proved in substantially the same words laid in the declaration. Any mere variation in the form of expression only, is not material, but the words alleged cannot be proved by showing that the defendant expressed the same meaning in different words. It is not necessary, however, to prove all the words laid, unless the omission of those not proved would so vary the meaning of the others as to make the charge as proved a different one from that alleged. *Ib.*

See LIBEL.

STATUTE OF FRAUDS; See FRAUDS, STATUTE OF.

STOPPAGE IN TRANSITU.

1. When goods are purchased and paid for by the order, note or accepted bill of a third party, without the indorsement or guaranty of the purchaser, the vendor has no right of stoppage *in transitu*. *Eaton et al. v. Cook*, 58.

2. When goods are sold to one person, who before delivery to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor will have no right of stoppage *in transitu*. *Ib.*

SUPREME COURT.

1. The supreme court will not, for the purpose of sustaining the judgment of the county court upon an auditor's report, presume that the court found any facts besides those reported, except such as are fairly to be inferred from them. *Pratt v. Page et al.*, 13.

2. The case of *Barber v. Britton & Hall*, 26 Vt. 112, questioned so far as it deviates from this principle. *Ib.*

3. The supreme court will not revise a former decision made by the same court, in the same cause, upon substantially the same state of facts. *Stacy v. Vt. Central R. R. Co.*, 533.

4. It is a general rule that the supreme court will not revise any questions except such as appear to have been raised in the court below; and this rule applies with peculiar propriety to questions of variance, (unless the variance appears of record, and is of such a character that the judgment would not protect the parties in reference to the matter actually litigated,) as such questions, if raised in the court below, can generally be removed, either by further proof or by amendment. *Brintnall v. S & W. R. R. Co.*, 665.

See BASTARDY; CONTEMPT OF COURT 3; EVIDENCE 14.

TAXES; See GRAND LIST; SCHOOL DISTRICTS; TOWNS.

TAX SALE; See PRESUMPTION 1, 2.

TENANTS IN COMMON; See CHANCERY 5.

TOWNS.

In an action against a town to recover back the taxes paid upon land which was by statute exempt from taxation, recovery can be had only for what has been paid as town taxes, and has gone into the town treasury. *Slack v. Norwich*, 818.

See CONSTABLE 1, 2; EVIDENCE 8; HIGHWAY 1, 2, 3.

TRESPASS.

1. If one have the right to enter and take possession of premises in the occupancy of another, his entry will be legal and not contrary to the statute concerning forcible entry and detainer, if made while the other party is temporarily absent from the premises, leaving no one there, even though it be necessary to force the door to gain admittance. *Mussey v. Scott*, 82.

2. The plaintiff having the right to the possession of a house occupied by the defendant, and having given him notice to quit, afterwards, while the defendant was temporarily, for the day only, absent from the house, which he had fastened upon leaving, entered the premises by forcing open the door, and placed the defendant's furniture in the street, and fastened up the house and left it. The defendant on returning, forced open the door and reentered and occupied the premises. *Held*, that the plaintiff's entry was the exercise of a legal right in a legal manner, and that he could maintain trespass *qu. cl.* against the defendant for his subsequent entry. *Ib.*

3. The plaintiff, having the right to enter upon certain land belonging to another, upon which was standing both pine and cedar timber, which timber belonged to the plaintiff, sold to the defendant the pine timber and the right to enter upon the land to cut and carry it away. Both parties having entered upon the land to cut and carry away the timber belonging to them respectively, the defendant carried away some of the cedar felled by the plaintiff. *Held*, that the plaintiff could maintain trespass *quare clausum fregit* therefor. *Haskin v. Record*, 575.

See JOINDER OF ACTIONS 1, 2, 3; PLEADING 3, 4, 5; RAILROADS 14.

TROVER.

1. If one, in good faith, purchase and subsequently sell stolen goods, he is liable in trover to the owner without a demand and refusal. *Courtis v. Canes*, 232.

2. The county court has the power, in an action of trover, to permit by order the return of the property alleged to have been converted, in mitigation of damages, and on payment of costs by the defendant, to order that the plaintiff shall thereafter proceed at his peril as to subsequent costs. *R. & W. R. R. Co. v. Bank of Middlebury*, 639.

3. This power, though its exercise in proper cases is discretionary with the court, can not be used when the defendant has acted wilfully in taking or keeping the property, when the property has deteriorated, or when its value is in dispute. *Ib.*

4. The mere fact, however, that the plaintiff claims damages, either general or special, beyond the value of the property, does not render it improper to make such an order. *Ib.*

5. The plaintiffs, a railroad company, deposited with the defendants certain of the former's mortgage bonds, payable to bearer, to be held by the defendants, upon the performance of a certain condition, for a specified purpose. This condition was not performed, but the defendants in good faith, claimed to hold the bonds for another purpose, and refused to surrender them on demand. These bonds were never worth above par, but, after their conversion by the defendants, they greatly depreciated in market value. The plaintiffs brought trover for the bonds, alleging in their declaration in addition to general damage, that they had, by the conversion, been deprived of the means of negotiating them and had been put to expense in raising funds to relieve their property from attachment. Before trial the defendants offered in court to deliver the bonds to the plaintiffs, and pay them their costs already accrued, and the county court made an order allowing them to bring such bonds and costs into court for the plaintiffs, and that if the latter refused to receive them they must proceed at their peril as to subsequent costs, unless they succeeded in recovering more than nominal damages above the face of the bonds. *Held*, that the case under such circumstances, was one proper for the exercise of the power of the court to make such an order in their discretion. *Ib.*

6. *Held*, also, the defendants having complied with this order, and the plaintiffs having refused to accept such compliance as a satisfaction of the suit, but having proceeded to trial, and proved no facts materially different from those appearing when the order was granted, that they were entitled to recover only nominal damages. *Ib.*

See JOINDER OF ACTIONS 1, 2, 3; FRAUDS, STATUTE OF, 1.

TRUSTEE PROCESS.

1. K. executed a note to T., the consideration of which was T's agreement to pay an equal amount of K's debts to his creditors. T. transferred the note

to K. H. & Co., as collateral security for a debt due them from him, and they immediately gave K. notice of the transfer. The plaintiff subsequently sued T. and trustee K. Afterwards T. fraudulently procured the note from K. H. & Co., without paying their claim, and transferred it for a full consideration to L., the claimant, who took it supposing it to be free from any lien whatever, and notified K. of its transfer to him. When K. made his disclosure in the trustee suit, T. had not paid all the former's debts which he had agreed to pay, but he did so before the case was disposed of in the county court. *Held*, that the trustee was chargeable for the balance of the note, after deducting K. H. & Co's claim against T. *Downer v. Tarbell and trustee*, 22.

2. In construing the statute (Comp. Stat. p. 256, sec. 1,) specifying what actions may be brought by the trustee process, the expression "*founded on any contract*," relates solely to the *form* of the action. *Elwell v. Martin and trustee*, 217.

3. In the trustee process, if the indebtedness of the trustee to the principal debtor is payable in labor or specific property on demand, and there had been previous to the service of the trustee process, no breach of the contract, the judgment against the trustee must be that he is chargeable for the amount of his indebtedness, payable to the plaintiff in the specific manner prescribed by the original contract. *Burtlett v. Wood and trustee*, 372.

4. If personal property owned in common be in the possession of a third party, the interest of one of the owners therein may be attached by the trustee process against the party in possession. *Ib.*

5. P. and L. made a contract by which L., who owned a patent right, authorized P. to sell the same in certain States of the Union, and it was agreed that P. was to sell the same; that out of all property and money received by P., by means of such sales, the expenses thereof should first be paid, and the remainder should be equally divided between P. and L., and that this division should be made as early as reasonably could be, and from time to time, whenever any such money or property should be received. The transaction of the business thus provided for necessitated the incurring of expenses which did not apply solely to any particular sale, but to the whole business together. *Held*, that under this contract the proceeds of the sales previous to a settlement of their expenses, belonged to P. and L. jointly, and no part thereof to either of them severally, and that individual creditors of neither party could by means of the trustee process, attach such party's interest in any of their joint property in the hands of a third person, whether such property was tangible or a debt due from such third person to P. and L. *Towne v. Leach and trustee*, 747.

6. If in a trustee process the plaintiff, trustee and claimant proceed either in the county court, or before a commissioner, where a commissioner can try the question, to a trial of the claimant's rights upon their real merits, and the substantial claims of the claimant fully appear, and have been tried upon their merits, without objection to the form of proceeding, it is too late to object in the supreme court that no allegations have been filed by the claimant. *Ib.*

7. In a trustee process, where a claimant is cited in or appears voluntarily, and his claim affects or determines the liability of the trustee to the plaintiff,

the case, so far as the conflicting rights of the plaintiff and claimant are concerned, is within the jurisdiction of a commissioner, and his decision is conclusive, as to the facts upon which the decision of the case must turn. *Id.*

8. If a trustee, under an arrangement with the first trusteeing creditor and the defendant, pay his debt to such creditor, and the latter does not prosecute his suit to judgment against the trustee, as well as the debtor, the trustee is still liable to a subsequent trusteeing creditor not a party to such arrangement, who does complete his judgment, and whose process was served prior to such arrangement. And the rule is the same whether the defendant's claim against the trustee is payable in money or in specific articles. *Wilder v Weatherhead and trustee*, 765.

9. A distributive share in the estate of a deceased person, belonging to a married woman cannot be attached by the trustee process, in a suit against the husband before a decree of distribution, nor until the latter has reduced it to possession. *Probate Court v. Niles et al.*, 775.

10. The defendant, being administrator on the estate of a deceased person, a distributive share of which belonged to a married woman, and was still in his hands, was, before any decree of distribution had been made, summoned, as such administrator, as trustee of her husband. *Held*, that his omission to appear and make disclosure in the trustee process, that no decree of distribution had been made, and thus suffering himself to be adjudged chargeable as trustee by default, was negligence, and that the payment by him, to the creditor of the amount of her distributive share upon a judgment so rendered against him, would not protect him from an action by the husband and wife upon his administrator's bond, for not paying over her distributive share. *Id.*

USURY.

1. Payments of usurious interest *eo nomine*, for the loan of money represented by a note, which in itself contains no usury, can be recovered back by the party making them, whether the note is paid in full or not; and the fact that such payments have been made by the principal will not avail the surety as a defence *pro tanto*, in an action on the note against him alone. *Ward v. Whitney*, 89.

2. The right to recover such usurious payments, or to have them applied as payments upon, or offsets to the note, is confined to the party who has paid the usury. *Id.*

3. C. borrowed \$1500 of the orator, and gave him his note for that amount, with interest, and secured the same by mortgage. He paid the orator seven per cent. interest upon the note for several years, and the annual indorsements of these payments showed the amount actually paid, and expressed them to be as and for each year's interest. In a petition for foreclosure of this mortgage against C. and a subsequent mortgagee, C. having without consideration released to the orator all claims of usurious interest paid by him, it was *held* that the subsequent mortgagee was not entitled to have the excess of such annual payments of interest over six per cent. applied in reduction of the amount due upon the note. *Churchill and wife v. Cole et al.*, 93.

VARIANCE, *See* SLANDER 3, 12; SUPREME COURT 4.

WAIVER, *See* COMPOSITION OF DEBTS 5, 6; RESCISION OF CONTRACTS 3.

WARRANTY, *See* DAMAGES 1; MOTION IN ARREST 1.

WATER COURSE, *See* SERVITUDES 1, 2.

WATER PRIVILEGE.

1. H. conveyed to W., the defendant, five acres of land, on which was situated a grist mill supplied with water by means of a dam and flume also situated upon the premises conveyed. Above this dam was a stump standing in the water, being the same referred to in the conveyance to the defendant and also in the deed to the plaintiff hereafter mentioned. By the above conveyance was granted to the defendant "the right to control the water for the purpose of a grist mill to the top of a certain stump of a tree standing in the water above the dam, and the said W. is to keep the present dam in good repair at its present original height, reserving to myself (the grantor) and heirs the right of drawing water from the dam or flume, not to interfere with the grist mill privileges in any shape or way, for any purpose I may think proper until the water is drawn down to the top of a stump formerly called low water mark." Subsequently H. conveyed to D., the plaintiff, an acre of ground on which was situate a saw mill, depending for water on the same source as the grist mill above mentioned, located below the grist mill and further from the dam and flume, "together with the right of drawing water for the use of said saw mill or other machinery attached thereto from the dam or flume, until the water may be or shall settle to the level of the top of a certain stump formerly called low water mark, said water to be drawn and used for said saw mill and any other purpose not inconsistent with water privileges heretofore granted." For the purpose of exercising the right of drawing water for the use of his saw mill, as granted in his deed, the plaintiff inserted a water gate in the side of the flume, the bottom of which was twenty-one inches below the level of the top of the stump, called low water mark, and five feet above the bottom of the flume. The defendant, denying the plaintiff's right to insert a gate in the flume lower than the level of the top of the stump, shut off the water from the flume by a head gate whenever the plaintiff attempted to draw water through the gate inserted by him in the flume, although the water in the pond was all the time above the level of the top of the stump.

Held, that whether the use of the gate, as it was inserted by the plaintiff would interfere with the "grist mill privileges" when reasonably exercised, was a question of fact to be determined by a jury, under proper instructions, in a case before them on that point. *Douglass v. Whittemore*, 685.

2 *Held*, also, that unless it would so interfere, it was a violation of the plaintiff's rights for the defendant to shut off the water from the flume, while it was above low water mark. *Id.*

3. *Held*, also, that if it would thus interfere, *quere*, whether the defendant would have the right to resort to such a method of preventing it. *Id.*

WILL.

1. It is not necessary to the due execution of a will that all the attesting witnesses should actually see each other sign it. It is sufficient if the testator and witnesses are all in the same room when the signatures of all the witnesses are made, and are there for the purpose of taking part in the execution of the will, and have an opportunity to see all the witnesses sign the will, if they choose to turn their eyes in that direction. *Heirs of Blanchard v. Heirs of Blanchard*, 62.

2. The mere intention or desire on the part of a testator to revoke his will, not carried into effect in the method prescribed by the statute, does not operate as a revocation. *Ib.*

3. It seems that if such intention be defeated by fraud, a court of equity would interfere to prevent the guilty person from taking advantage of his own wrong; and to restore the fund to the channel from which it was diverted by the fraud. *BENNETT, J. Ib.*

4. When a will, executed in another jurisdiction, has been there proved and allowed, and a probate court in this State has allowed a certified copy of such will, and the foreign probate thereof, to be allowed, filed and recorded here as an original will, it will be presumed that the probate court had jurisdiction of the will until the contrary appears. *Townsend v. Estate of Downer*, 183.

5. All objections to the validity of the authentication of the foreign probate of the will must be taken in the probate court, or they will be considered as waived. *Ib.*

WITNESS.

The plaintiff brought a suit at law against P., who afterwards, in July, 1833, died, and the suit was, therefore, discontinued under the statute, and the same claim presented before the commissioners on P's estate. *Held*, in an appeal from the decision of the commissioners, that the plaintiff was not a competent witness. *Pierce v. Estate of Paine*, 229. }{

Ex, H. A. A.



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